IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [illegible]

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS, ET AL.,

Petitioners,

versus

JERRY R. ENGLAND, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled case on September 9, 1958, wherein a re-hearing was denied on January 23, 1959.

I.

CITATIONS TO OPINIONS BELOW

The Reasons for Judgment and Judgment of the District Court are printed in full in the Record at pp.

36, 38. The Opinion was not reported, but is printed in Appendix A, *infra* p. 19. The opinion of the Circuit Court of Appeals is printed in Appendix B hereto, *infra* p. 21, is reported in 259 F. 2d 626. The opinion of the Circuit Court of Appeals, on re-hearing, is printed in Appendix C hereto, *infra* p. 41, is not yet reported.

II.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 9, 1958. (R. p. 65) Re-hearing was denied on January 23, 1959. (R. p. 109(a)) The jurisdiction of this Court is invoked under *28 U.S.C. Section 1254 (1).*

III.

QUESTIONS PRESENTED FOR REVIEW

(a) The constitutionality under the Fourteenth Amendment to the Constitution of the United States of LSA-R.S. 37:1261 *et seq.* (commonly referred to as the Louisiana Medical Practice Act). Printed in Appendix F hereto, *infra* p. 77.

(b) Whether the powers conferred upon the Louisiana State Board of Medical Examiners by the Louisiana State Medical Practice Act are being used in such a manner as to deprive the respondent of their claimed right to practice chiropractic in Louisiana. A subsidiary question is whether respondents can be constitutionally excluded from the practice of chiropractic in Louisiana.

(c) The decision of the Circuit Court of Appeals in reversing the judgment of the District Court is in conflict with applicable decisions of this Court construing

and holding similar statutes to be constitutional and a proper exercise of the states' police power.

(d) The decision of the Circuit Court of Appeals has remanded the cause for further proceedings in the United States District Court for the Eastern District of Louisiana, New Orleans Division, not inconsistent with the *Per Curiam* of said Court rendered September 9, 1958, and the decision of said Court denying a re-hearing on January 23, 1959, which judgment is not consistent with the Constitution of the United States and the Amendments thereto, and the applicable Statutes and Acts of Congress in that no serious Federal question not heretofore decided by this Court is presented.

IV.

STATUTES INVOLVED

The original petition by respondents refers to rights under a number of Statutes, which were not considered in the Court of Appeal opinions, but listed and printed in the Appendix are all such Statutes.

This case involves the Fourteenth Amendment to the Constitution of the United States, printed in Appendix D, *infra* p. 74; Article VI, Section 12 of the Constitution of Louisiana, printed in Appendix E, *infra* p. 76; LSA-R.S. 37:1261 *et seq.*, printed in Appendix F, *infra* p. 77; 28 U.S.C., Section 1331, printed in Appendix G, *infra* p. 88; 28 U.S.C., Section 1343 (3), printed in Appendix H, *infra* p. 89; 42 U.S.C., Sections 1981 and 1983, printed in Appendix I, *infra* p. 90; 28 U.S.C., Sections 2201 and 2202, printed in Appendix J, *infra* p. 91; 28 U.S.C., Sections 2281 and 2284, printed in Appendix K, *infra* p. 92.

V.

STATEMENT OF THE CASE

This action was filed by a number of persons designating themselves as chiropractors on May 23, 1957. All of the respondents were alleged residents and citizens of the State of Louisiana. The petitioners herein were designated as Louisiana State Board of Medical Examiners, (hereinafter referred to as the Board), Rhett McMahon, President, Louisiana State Board of Medical Examiners, and Edwin Lawson, Secretary, Louisiana State Board of Medical Examiners.

The jurisdiction of the District Court was invoked under *28 U.S.C., Section 1331* and *42 U.S.C., Sections 1981 and 1983*. The respondents further set forth that they have been, are now, and are threatened to continue to be denied the rights, privileges and immunities secured to them as citizens of the United States by the Constitution of the United States and of the full and equal benefit of the pertinent laws, and are to be deprived of their civil rights as citizens of Louisiana and of the United States.

The jurisdiction of the District Court was further invoked under *28 U.S.C., Section 1343 (3)*, it being claimed that the action was for the redress of the deprivation, under color of law, of the rights, privileges and immunities secured to respondents as citizens of the United States by the Constitution and Laws of the United States.

Injunctive relief, including a request for a temporary restraining order and for a temporary and permanent injunction, was sought under *28 U.S.C., Sections 2281 and 2284* to enjoin and restrain the operation or execu-

tion of the Medical Practice Act of Louisiana, and certain actions of the Louisiana State Board of Medical Examiners and its officers performed in accordance with and as directed by the provisions of such Act.

Further relief was sought by respondents under *28 U.S.C., Sections 2201 and 2202* for a Declaratory Judgment to determine and define the legal rights and relations of respondents in connection with the Louisiana State Medical Practice Act and its administration by the Board. Specifically, the petition requested that the Court adjudicate by means of a Declaratory Judgment the following questions:

(a) Whether the provisions of *LSA-R.S. 37:1261 et seq.* deny respondents their rights, privileges and immunities as citizens of the United States and equal protection of the laws secured to them by the Fourteenth Amendment to the Constitution of the United States, or the rights and privileges secured to them by *42 U.S.C., Sections 1981 and 1983.*

(b) Whether the administration by the Board and its officers of *LSA-R.S. 37:1261 et seq.* denied to respondents the legal right to practice chiropractic in the State of Louisiana in contravention of their rights, privileges and immunities as citizens of the United States under the Fourteenth Amendment to the Constitution of the United States or the rights and privileges secured to them under *42 U.S.C., Sections 1981 and 1983.*

Petitioners herein filed a Motion to such petition, presenting defenses under Rule 12 (b), on the following grounds: (a) The Complaint fails to state a claim against defendants upon which relief can be granted; (b) the Court is without jurisdiction over the subject

matter of this action; and (c) the Court is without jurisdiction over the persons made defendants.

The case as thus presented to the Court was argued and briefs submitted, and on June 14, 1957, an order was granted dismissing respondents' action for the following succinct reasons:

> "Since no serious federal question, not heretofore decided by the Supreme Court of the United States, is presented, in the absence of diversity of citizenship, this court is without jurisdiction. *Ex Parte Poresky*, 290 U.S. 30; *Louisiana State Board of Medical Examiners vs. Fife*, 162 La. 681, 111 So. 58, 274 U.S. 720; *Graves vs. Minnesota*, 272 U.S. 425; *Douglas vs. Noble*, 261 U.S. 165; *Dent v. West Virginia*, 129 U.S. 114; *Bush v. Orleans Parish School Board*, 138 F. Supp. 336, aff'd 5 Cir., 242 F. 2d 156; *Pelhemus v. American Medical Association, et al*, 10 Cir., 145 F. 2d 367; *Hitchcock v. Collenberg, et al*, 140 F. Supp. 894; *New Jersey Chiropractic Association v. State Board of Medical Examiners*, 79 F. Supp. 327."
>
> (R. 37; Appendix A, *infra* p. 19)

The actual judgment dismissing the action was entered on June 20, 1957. R. 37; Appendix A, *infra* p. 19.

An appeal was prosecuted to the Circuit Court of Appeals, which handed down a Per Curiam decision on September 9, 1958, reversing and remanding the cause for further proceedings not inconsistent with the Court's opinion. In effect, the Court of Appeals held that respondents were entitled to their "day in Court" because a reasonable man might intelligently choose a chiropractor for the treatment of some particular ailment. The Court did not comment on the fact that this Court had previously decided every issue raised by the re-

spondents adversely to their contentions. The decision was by a divided Court, with Judge Wisdom writing what we consider a well conceived and logical dissenting opinion. An application for a re-hearing was then filed by petitioners and denied by the Court of Appeals on January 23, 1959. In denying the application for a re-hearing, the Court of Appeals appears to have conceded the correctness of petitioners' position in all respects, but nevertheless were still of the opinion that respondents were entitled to their "day in Court". Again, Judge Wisdom wrote a further dissenting opinion, in which he points out the errors and illogical reasoning of the majority views.

VI.

REASONS FOR GRANTING THE WRIT

1. Clearly, the question presented are of great importance to the State of Louisiana and to every other state of the Union. The Court of Appeals' decision directly bears upon the inherent right of a state to regulate the practice of medicine under its police power. In effect, the Court of Appeals holds that Federal Courts would have the right to issue some form of decree permitting the practice of chiropractic in Louisiana should it be held upon evidence adduced on remand that the Act as administered "has no rational relation" to the regulation of chiropractic and "therefore is beyond constitutional bounds".

It indeed seems an anomaly that a Federal Court has a right to assume such a power which is clearly within the province of the Legislature elected by the people. This line of reasoning is clearly contrary to the express holdings by this Court in many decisions. There is no conflict between the Courts of Appeal of the various

states, but only a conflict between this decision and the well settled judicial policy of this Court. See *Graves vs. Minnesota*, 1926, 272 U.S. 425; *Douglas vs. Noble*, 1923, 261 U.S. 165; *Dent vs. West Virginia*, 129 U.S. 114; *Williamson vs. Lee Optical Company*, 1955, 348 U.S. 483; *Dantzler vs. Callison*, S. Car. 1956, 94 S.E. 177, dismissed per curiam for want of a substantial federal question, 1956, *352 U.S. 939*; *Hitchcock vs. Collenberg*, 1956, 140 F. Supp. 894, aff'd per curiam, 1957, *353 U.S. 919*; and *Taylor vs. Oklahoma*, 352 U.S. 805.

We particularly direct attention to the conclusion reached by Mr. Justice Douglas, the organ of the Court, in *Williamson vs. Lee Optical Co., supra:*

> " • • • But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> "The day is gone when this Court used the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. See *Nebbia v. New York*, 291 U.S. 502; *West Coast Hotel Co. v. Parish*, 300 U.S. 379; *Olsen v. Nebraska*, 313 U.S. 236; *Lincoln Union v. Northwestern Co.*, 335 U.S. 525; *Daniel v. Family Ins. Co.*, 336 U.S. 220; *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421. We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, 94 U.S. 113, 134, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts' ". (348 U.S. at pp. 487-488)

We can think of no question of more serious import at the present time than the rendition of a decision by

the Court of Appeals that seriously detracts from the inherent right of a state to protect the health and life of its citizens by the exercise of its police power.

2. The decision of the Court of Appeals is believed to be erroneous because based on the false premise that the Louisiana Medical Practice Act excludes respondents from the practice of chiropractic in Louisiana. Such is not the case, as ably pointed out by Judge Wisdom in his dissenting opinion to the Per Curiam decision of September 9, 1958. He says:

> "There is no discrimination against chiropractors as such. The Act does not prohibit the practice of chiropractic or of any other system. The statute simply prohibits the practice of medicine without a license. It applies to all. Anyone who can meet the qualifications may take an examination, and upon passing, will be issued a license. Thereafter, if he chooses, he may specialize in the 'science of chiropractic'. In at least one instance (according to the exhibits) a license was issued to a practicing chiropractor who met the requirements of the Act."
>
> (R. 59; Appendix B, *infra* p. 21)

The problem would appear to be most simple. The Legislature of Louisiana has defined what it considers to be the practice of medicine and then establishes certain standards for those desiring to engage in such practice. See LSA-R.S. 37:1261 *et seq.* Appendix F, *infra* p. 77. The standards established by the Legislature are entirely reasonable. Section 1271 (4) requires an applicant to furnish a diploma from a "college in good standing". Section 1271 (5) lists the subjects on which the applicant must be examined: "Anatomy, Physiology, Chemistry, Physical Diagnosis, Pathology and Bacteriology, Hygiene, Surgery, Theory, and Practice of Medicine, Materia

Medica, Obstetrics, and Gynecology." This list is certainly a reasonable one to be required of those persons to be entrusted with the practice of medicine and bounden to the protection of the health of the public. In effect, the Legislature, in Section 1275 defined "a college in good standing" as "a Class A college standard American Medical Association". Assuredly, it cannot be said that the Board is acting unreasonably or arbitrarily in applying these minimum standards to Louisiana applicants.

How can it be urged that the practice of chiropractic has no reasonable relation to the practice of medicine, when the respondents themselves contend that a diploma from the Palmer School of Chiropractic and others is a "college in good standing of **any sect** teaching medicine or the healing art". As a matter of fact, the record is replete with allegations and statements that the practice of chiropractic is actually the practice of medicine under their particular theories of the healing art.

The Supreme Court of the State of Louisiana was first called upon to consider this Statute in the case entitled *Louisiana State Board of Medical Examiners* rs. *Cronk*, 157 La. 321, 103 So. 415, in the year 1924. The defendant in that case was a chiropractor and appealed from a judgment of the District Court for the Parish of Rapides, sustaining an injunction sued out against him by the Louisiana State Board of Medical Examiners. The Supreme Court in affirming the judgment of the District Court, held that a chiropractor was practicing medicine within the definition of Section 13 of the Act of 1914. The Court referred to testimony of the Dean of Faculty of the Palmer School of Chiropractic, who defined Chiropractic in the following language:

> "The theory of chiropractic is that the subluxation produces pressures upon nerves which produce ab-

> normal conditions on the tissues of the body; and by the adjustment of this subluxation the pressure is relieved, normal impulses are allowed to flow through these nerves, and the natural forces of the body do the rest."

The defendant in the course of the trial admitted that he had treated many persons suffering with liver, kidney and stomach complaints and with other bodily ailments, and of course that he did not have a license to practice medicine as required by the Medical Practice Act.

The Court of Appeals in its Per Curiam decision on September 9, 1958 said:

> " * * * Can we say without hearing the evidence that chiropractic is no more entitled to recognition today than it was thirty odd years ago? It is claimed that the practice of chiropractic has now been legalized in forty-four of the States, in Hawaii, and in the District of Columbia, and that respectable colleges of chiropractic have been founded with courses comparable in length and claimed to be equal in quality to the medical colleges. * * * "
>
> (R. 44; Appendix B, *infra* p. 21)

In referring to the passage of some thirty odd years, the Court of Appeals had reference to the fact that the *Fife* case, *supra*, was affirmed by this Court on May 2, 1927, *274 U.S. 720*. In other words, the Court apparently feels that the whole reasoning and logic of that decision, as well as others by this Court, no longer bear the test of time. This would seem to be a rather illogical conclusion to reach in view of the fact that this Court has recently upheld the doctrine enunciated in the earlier cases in *Williamson vs. Lee Optical Co., supra, Dantzler vs. Callinson, supra;* and *Hitchcock vs. Collenberg, supra.*

In this latter case, the attack on the Medical Act was by a naturopath and the Per Curiam opinion of this Court affirmed a three-Judge decision which was decided on a motion to dismiss under a holding that the practice of a naturopath bears a rational relation to and in fact was and constituted the practice of medicine.

Maybe it is true that chiropractic has made some advances in thirty odd years and that they may be of benefit to some persons within a most limited and restricted field. But how does that affect the constitutional right of a Federal Court to hold a state Medical Practice Act to be unconstitutional because chiropractic, even with their alleged advancement in thirty-odd years, cannot meet with the medical requirements of such statutes? Is the Federal Court system to set itself up as omnipotent and clothe itself with powers vested by the Constitution itself in the states and their legislative bodies?

In this connection, we found it somewhat odd that the Court of Appeals in its opinion on re-hearing concludes by saying:

> "Indeed, the burden upon the plaintiffs is great, if not insurmountable. They must show that the Act as administered 'has no rational relation' to the regulation of chiropractic and 'therefore is beyond constitutional bounds'. *Williamson v. Lee Optical Company, supra*, 248 U.S. 483, 491. For such a determination, it is immaterial whether chiropractic is considered as a school or cult or theory or specialty or profession. That is for the legislature to determine if the plaintiffs prevail in this suit."
>
> (R. 96; Appendix C, *infra* p. 41)

The Court of Appeals had earlier said in its opinion:

"The Louisiana State Board of Medical Examiners

certainly cannot be required to issue to a chiropractor a license to practice medicine unless he complies with all of the statutory prerequisites, including the passing of an examination before the Board upon the subjects of surgery and materia medica, which the appellants claim bear no reasonable relation to the practice of chiropractic."

(R. 76; Appendix C, *infra* p. 41)

If the determination just quoted from the Court of Appeals is correct, and we believe it to be so, then what decree could be rendered on remand of this case should "the plaintiffs prevail in this suit"? It seems rather paradoxical that the Court of Appeals in the same sentence says, " • • • That is for the legislature to determine. • • • " Despite all the catch phrases that can be gleaned from various decisions, most of which are completely out of context, (See Court of Appeals Opinion, R. 42, Appendix C, *infra* p. 41) we come back to the fundamental concept of constitutional law that a state has the inherent right to exercise its police power for the protection of its public by the enactment of reasonable standards for the practice of medicine.

We now wish to come back briefly to the emphasis laid by the Court of Appeals in its original opinion, "that the practice of chiropractic has now been legalized in forty-four of the states, in Hawaii; and in the District of Columbia". In considering the fact that other states have legalized the practice of chiropractic the Court completely overlooked the fact that no state has ever legalized a chiropractor or other cultist to practice medicine in contravention of the standards of a medical practice act. In not one of those states, or Hawaii, or the District of Columbia, were chiropractors permitted to practice either medicine or chiropractic by Court decree. In other words, it has been left to the individual state and its Legislature

elected by the people of the state to determine whether chiropractic should be legalized to practice within a limited area. Judge Wisdom in his dissenting opinion on re-hearing (R. 102, 103; Appendix C, *infra* p. 41) crystalizes our thinking on this phase of the case when he says:

> "The rationale of the Louisiana act is, that there is a reasonable connection between practicing medicine and requiring candidates for a medical license to have adequate training in medicine, obstetrics, and surgery. If an exception is to be made for certain practitioners, such as for nurses or chiropodists or dentists, special legislation is necessary to protect the public. The experience of other states supports the reasonableness of this view.
>
> "*No state allows chiropractors to be issued a license under the general provisions of a medical practice act.* In every state where chiropractors are permitted to practice there is either a special act applicable to chiropractors or special provisions dealing with chiropractors. In all of these states the law, in terms, prohibits chiropractors administering drugs, and medicines, performing major or minor surgery, and practicing obstetrics or osteopathy. And in such states a chiropractor may hold himself out only as a doctor of chiropractic. But the purpose of the licensing provisions of the Louisiana Medical Practice Act is to authorize a person to do the very things a chiropractor is prohibited from doing in the states granting licenses to chiropractors."

8. The Court of Appeals in its opinion on re-hearing discusses all of the decisions referred to in this petition and others, and throughout recognizes that this Court has consistently decided every issue raised by respondents adversely to their contentions. To put it in other words,

petitioners have won every battle but lost the war. In essence, the Court of Appeals agrees with every contention made by petitioners, but then falls back upon its original holding that respondents are entitled to their "day in court". We refer to the language on Page 23 of the Opinion on Rehearing (R. 93; Appendix C, *infra* p. 41), where they cite a concurring opinion in *Borden's Co. v. Baldwin*, 1934, 293 U.S. 194, 213, by Mr. Justice Stone and Mr. Justice Cardozo:

> "We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer."

Of course, these eminent Justices did not intend to abrogate the Federal Rules of Civil Procedure with respect to Motions to Dismiss for failure to state a claim and Summary Judgments (See Rules 12(b) and 56). As a matter of fact, they were most careful to qualify their ruling by limiting it to those cases where "there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer".

In the instant case, there could be no evidence which would clarify the constitutional issues before the Court. Respondent chiropractors are represented in this action by extremely competent counsel, who prepared an excellent and certainly a most comprehensive complaint. If we accept every fact alleged as being true and that evidence could be introduced to prove the accuracy of each allegation, there would still be no serious federal question not heretofore decided by the Supreme Court of the United States. The views of the majority opinion are ably countered by Judge Wisdom in his dissenting opin-

ion on Page 26 (R. 97, Appendix C, *infra* p. 41).

The right and duty of the lower courts to dispose of cases under the Federal Rules of Civil Procedure and to dismiss or render summary judgments in proper cases cannot be disputed. See *Ex Parte Poresky*, 290 U.S. 30; *Bush vs. Orleans Parish School Board*, 242 F. 2d 156; *Polhemus vs. American Medical Association*, 145 F. 2d 367.

The remand of this case for the hearing of evidence upon admitted facts will serve no useful purpose under the well-established and sound jurisprudence which has prevailed in this Court for many years. As Judge Wisdom said:

> " 'The right to a day in Court' is a powerful contrip as well as a fundamental maxim of justice. The spell of these words is hard to resist. Here, it is luring us from the broad highway of long accepted principles of law into tangled trails."
>
> (R. 97; Appendix C, *infra* p. 41)

VII.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

This is to certify that copies of this Petition have been served on counsel for respondents, J. Minos Simon, 301 Congress Street, Lafayette, Louisiana, Floyd J. Reed, 919 Maison Blanche Building, New Orleans, Louisiana; Russell Morton Brown, 605 Southern Building, Washington, D. C.; and Jack L. Sims, Leesville, Louisiana, by placing the same in the United States Mail, postage prepaid, on April 16, 1959.

(Sgd.)
Robert E. LeCorgne, Jr.
Robert E. LeCorgne, Jr.

APPENDIX A

ORDER GRANTING MOTION TO DISMISS

Minute Entry April 2, 1959 Wright, J:

This cause came on to be heard on motion of defendants to dismiss and after hearing argument, studying the briefs and considering the issues involved, the Court is now ready to rule.

IT IS ORDERED that defendants' motion to dismiss, treated as a motion for summary judgment, be and the same is hereby granted.

REASONS

Since no serious federal question, not heretofore decided by the Supreme Court of the United States, is presented, in the absence of diversity of citizenship, this court is without jurisdiction. *Ex Parte Poresky*, 290 U.S. 30; *Louisiana State Board of Medical Examiners v. Fife*, 162 La. 681, 111 So. 58, 274 U.S. 720; *Graves v. Minnesota*, 272 U.S. 425; *Douglas v. Noble*, 261 U.S. 165; *Dent v. West Virginia*, 129 U.S. 114; *Bush v. Orleans Parish School Board*, 138 F. Supp. 336, aff'd 5 Cir., 242 F. 2d 156; *Polhemus v. American Medical Association, et al*, 10 Cir., 145 F. 2d 367; *Hitchcock v. Collenberg, et al*, 140 F. Supp. 894; *New Jersey Chiropractic Association v. State Board of Medical Examiners*, 79 F. Supp. 327.

J. S. W.

JUDGMENT

Minute Entry April 2, 1959 Wright, J:

This cause having been heard at a former day, on the motion of defendants to dismiss, and the Court hav-

ing granted the said motion to dismiss and having filed its written reasons in support of said ruling;

IT IS ORDERED, ADJUDGED AND DECREED by the Court that judgment be, and is hereby entered, in favor of the defendants and against the plaintiffs, dismissing plaintiffs' suit, with costs.

J. S. W.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16920

JERRY R. ENGLAND, ET AL.,
Appellants,

versus

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(September 9, 1958.)

Before RIVES, BROWN, and WISDOM, Circuit Judges.

PER CURIAM: This case was originally assigned to Judge Wisdom, who has written an opinion, which has been changed to appear as the dissenting opinion, fully and fairly developing the issues and concluding in affirmance of the district court's judgment in accordance with the tentative vote of all three judges in conference. Upon further study and deliberation, however, Judges Rives and Brown now believe that the district court erred in dismissing the complaint for lack of a substantial federal question warranting exercise of jurisdiction. Ex parte Poresky, 290 U.S. 30.

We are not called on at this time to say whether chiropractors should be admitted to practice in Louisiana, but the question is whether they are entitled to an opportunity to prove that the State's denial of their claimed right to practice an allegedly useful profession is so arbitrary and unreasonable as to amount to a denial of due process or of the equal protection of the laws under the Fourteenth Amendment. It is certainly true that the State is not bound to recognize every peculiar theory or school of medicine. Without doubt it is reasonable for the state to outlaw witch doctors, voodoo queens, bee stingers, and various other cults which no reasonably intelligent man would choose for the treatment of his ills, but it would certainly be arbitrary to exclude some, if not all, of the following classes which Louisiana does admit to practice: dentists, osteopaths, nurses, chiropodists, optometrists, pharmacists, and mid-wives. Just where is the dividing line? Under all of the cases, we think it is that the State cannot deny to any individual the right to exercise a *reasonable* choice in the method of treatment of his ills, nor the correlative right of practitioners to engage in the practice of a useful profession.

The case closest in point to that now presented is *Louisiana State Board of Medical Examiners v. Fife*, 1926, 162 La. 681, 111 So. 58, affirmed in a Per Curiam opinion on May 2, 1927, 274 U.S. 720. In the thirty odd years since that decision was rendered, we judicially know that the healing art in general has made further enormous progress away from the ancient days when barbers did the blood letting. Can we say without hearing the evidence that chiropractic is no more entitled to recognition today than it was thirty odd years ago? It is claimed that the practice of chiropractic has now been legalized in forty-four of the States, in Hawaii, and in

the District of Columbia, and that respectable colleges of chiropractic have been founded with courses comparable in length and claimed to be equal in quality to the medical colleges. It is not denied that the state may regulate, within reasonable bounds, the practice of chiropractic for the protection of the public health; but it is claimed that the requirements of a diploma from a college approved by the American Medical Association and a knowledge of surgery and materia medica bear no reasonable relation to the practice of chiropractic. Without hearing the evidence, we cannot say that those claims are untrue, or that a reasonable man might not intelligently choose a chiropractor for the treatment of some particular ailment. We hold simply that the plaintiffs are entitled to a day in court, to an opportunity to prove their case. The judgment is therefore reversed and the cause remanded for future proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

WISDOM, Circuit Judge, Dissenting:

This is an appeal from the United States District Court for the Eastern District of Louisiana. Appellants requested that a three-judge court be convened. The request was denied. After a hearing on appellee's motion to dismiss, treated as a motion for summary judgment, the district court dismissed the complaint.

With all due deference to my learned brothers on the Court, respectfully I dissent. It seems to me that there is no dispute as to any material factual issue. The critical issues of law appear on the face of the pleadings. We should decide them now.

Chiropractors are entitled to their day in court. They are not entitled to an extra day.

It is the business of the state to decide who shall practice medicine and under what circumstances a license may be issued. It is not our business—unless (1) the licensing statute is so unreasonable or (2) is administered so unreasonably as to amount to a denial of due process or of equal protection of the laws under the Fourteenth Amendment.

The statute is in the books for us to read. It has been interpreted by the Supreme Court of Louisiana. Similar statutes have been interpreted by the Supreme Court of United States. The overwhelming weight of the decisions is against the plaintiffs.

Remand of this case produces a strange paradox. It allows a trial in order to show that chiropractic has advanced so far in the last thirty years that the Louisiana Medical Practice Act is unconstitutional—since it has no exception to permit *lower* standards to be applied to chiropractors than to any other applicants for a license to practice medicine. The effect of remanding is to allow the plaintiffs to introduce evidence that the Louisiana Board of Medical Examiners is acting unconstitutionally in that the Board does not disregard the statute by making a special exception for chiropractors, since they cannot meet the standards everyone else must meet.

Evidence that materia medica and surgery bear no relation to chiropractic strikes me as immaterial. The standards established in the Louisiana Medical Practice Act do not purport to bear a relation to the practice of chiropractic. The object of the law is to license those persons holding themselves out as qualified medical doc-

tors—qualified to practice surgery and medicine generally, not chiropractic.

It may be difficult in some cases for judges to avoid interstitial lawmaking. But not here. This is a clear case where it is for the legislature to take notice of the limitations in the medical training and the practice of chiropractic. It has done so in many similar cases: optometrists, mid-wives, pharmacists, osteopaths, nurses, and chiropodists. It is not for us to make a law for chiropractors or to say that the legislature enacted an unconstitutional law because it makes all applicants for a medical license toe the same mark.

Accepting the pleadings and exhibits as true, the plaintiffs failed to make a case. They failed to present a federal question not already decided against them by the United States Supreme Court. Since there is no diversity of citizenship, the district court properly held that it had no jurisdiction. *Hitchcock v. Collenberg*, 1956, D. Ct. Md., 140 F. Supp. 894, involving naturopathic practitioners, and citing leading Louisiana cases, is almost on all fours with the instant case. The United States Supreme Court affirmed *Hitchcock v. Collenberg* in a per curiam opinion in 1957, 353 U.S. 919, 77 S. Ct. 679, 1 L. Ed. 2d 718, citing *Dent v. West Virginia*, 1889, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623. *Cf.* the per curiam opinion affirming *Louisiana State Board of Medical Examiners v. Fife*, 1926, 162 La. 681, 111 So. 58; 1927, 274 U.S. 720, 47 S. Ct. 590, 71 L. Ed. 1324.

The continuity in this field of law is unbroken.

I.

Forty chiropractors filed suit. Each holds a diploma allegedly from "a school in good standing teaching the

healing arts, to-wit: the Science of Chiropractic". They ask for a declaratory judgment and for an injunction against the Louisiana State Board of Medical Examiners. (1) They attack the constitutionality of the Louisiana Medical Practice Act (La. R.S. 37:1261 et seq.) on the ground that on its face the statute is arbitrary, discriminatory, and couched in terms so as to deprive appellants of their civil rights, privileges, and immunities, and equal protection under the Constitution and laws of the United States. (2) They attack the Louisiana State Board of Medical Examiners as acting unconstitutionally in discriminating wilfully and maliciously against chiropractors, in violation of the plaintiffs' constitutional rights under the Fourteenth Amendment.

The Louisiana Medical Practice Act creates the Louisiana State Board of Medical Examiners "to examine all applicants for the practice of medicine". Section 1271 is the center of the chiropractors' target. This reads:

> "Any person who wishes to practice medicine shall:
>
> (1) Be twenty-one years of age;
>
> (2) Be a citizen of the United States;
>
> (3) Be of good moral character;
>
> (4) Present to the board a diploma from a college in good standing of any sect teaching medicine or the healing art; and
>
> (5) Pass an examination before the Board upon the following: Anatomy, Physiology, Chemistry, Physical Diagnosis, Pathology, and Bacteriology, Hygiene, Surgery, Theory and Practice of Medicine, Materia Medica, Obstetrics, and Gynecology."

In Section 1275 the legislature allows the Board to waive examinations in favor of an applicant from another

state who presents a certificate of examination from a board of medical examiners "received on the equivalent of a Class A college standard American Medical Association".

In line with Section 1275, the Board has consistently construed "a college in good standing" to mean a medical school approved by the Association of American Medical Colleges or the Council on Medical Education and Hospitals of the American Medical Association. Schools of chiropractic are not accredited by the American Medical Association. Over the years, while the Board has so construed the law, the act has been amended and reenacted on a number of occasions, and in 1950 was reenacted as part of the Louisiana Revised Statutes.

The chiropractors contend, first, that the Act delegates arbitrary authority to the Board, with no standards to guide the Board in determining what is a "college in good standing". The chiropractors insist, secondly, that they are as qualified as anyone else under the terms of the statute to take the examination. The Board's construction of the statute has the effect of prohibiting the practice of chiropractic in Louisiana and is therefore discriminatory. In any event, they argue that chiropractors should enjoy the exemption given dentists, osteopaths, and pharmacists.

II.

The Louisiana Medical Practice Act is substantially similar to medical practice statutes of other states. These statutes have been attacked frequently on constitutional grounds similar to those the chiropractors urge on this appeal. Three decisions of the United States Supreme Court are the leading cases on the subject: *Dent v. West*

Virginia, 1889, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623; *Douglas v. Noble*, 1923, 261 U.S. 165, 43 S. Ct. 303, 67 L. Ed. 590; *Graves v. Minnesota*, 1926, 272 U.S. 425, 47 S. Ct. 122, 71 L. Ed. 331. See also *Hitchcock v. Collenberg*, 1956, D. Ct. Md., 140 F. Supp. 894, aff'd per curiam, 1957, 353 U.S. 919, 77 S. Ct. 679, 1 L. Ed. 2d 718, citing *Dent v. West Virginia*.

No one of course has an absolute right to practice medicine. This right is conditioned upon one's complying with reasonable regulations imposed by the State to protect the public health and welfare. Courts at every level in the judicial hierarchy emphasize that no profession is more open to eligibility regulations than the practice of medicine. ". . . Dealing, as its followers do, with the lives and health of the people, and requiring for its successful practice general education and technical skill, as well as good character, it is obviously one of those vocations where the power of the state may be exerted to see that only properly qualified persons shall undertake its responsible and difficult duties." *Watson v. State of Maryland*, 1910, 218 U.S. 173, 176, 30 S. Ct. 644, 54 L. Ed. 987.

In *Dent v. West Virginia* the Court passed upon the validity of a state statute requiring every practitioner of medicine to obtain from the State Board of Health a certificate showing that he was a graduate of "a reputable medical college" or had practiced medicine ten years or had been examined by the Board and found qualified to practice medicine. The claim was made that the statute was unconstitutional because it vested in the Board arbitrary power to decide what was a reputable medical college, and thereby deprived defendant of due process. The Court sets forth basic considerations governing the

power of a state to issue a license.[1] The Court held that the statute did not violate due process, and also intimated that the equal protection clause could not be used to strike down the statute either. Mr. Justice Field, for the Court, said: "Few professions require more careful preparation by one who seeks to enter it than that of medicine. . . . Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. . . . No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possess such learning and skill, shall present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications." The Court pointed out that: "There is nothing of an arbitrary character in the provisions of the statute in question; *it applies to all physicians* . . . it imposes no conditions which cannot be readily met; . . ."

The question of inadequate standards was not raised

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[1] "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions * * * The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. As one means to this end and it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely; their possessions being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation."

in the Dent case. It was in *Douglas v. Noble*, involving a Washington statute providing that only licensed persons might practice dentistry. All applicants were required to undergo an examination by a board of examiners. To be eligible, the applicant had to be of good moral character and present a diploma from "a reputable dental college". The contention was, that since the statute did not state in terms what the scope and character of the examination should be, arbitrary power was conferred upon the board in violation of due process. Mr. Justice Brandeis, for the Court, pointed out that the authority the statute confers is a matter of construction and "its construction is a question of state law". Washington courts had construed the statute as not conferring arbitrary power upon the Board. The Supreme Court agreed that the statute indicated a general standard of fitness and the character and scope of the examination; subsidiary matters were appropriately committed to an administrative board; "the discretion here granted the examining board was well within the limits allowed by the Federal Constitution". The principles expressed in *Douglas v. Noble* are alive and pertinent.

Graves v. Minnesota passes directly on the question whether a state could require a dentist to attend a school "in good standing" to be eligible for an examiantion before a Board of Dentists. The Court sustained the conviction of a dentist for practice of dentistry without a license even though he was a graduate dentist, because he was not graduated from an accredited school. The statute required a diploma from a "dental college of good standing". "By enacting the present statute the State has determined, through its legislative body, that to safeguard properly the public health it is necessary that no one be licensed to practice dentistry who does not hold a diploma from a dental college of good standing. That

determination must be given great weight. . . . Clearly the fact that an applicant for a license holds a diploma from a reputable dental college has a direct and substantial relation to his qualification to practice dentistry. We cannot say that the State is acting arbitrarily or unreasonably when, in the exercise of its judgment, it determines that the holding of such a diploma is a necessary qualification for the practice of dentistry; or that the distinction made in the granting of licenses between applicants who hold such diplomas and those who do not, is a classification which has no real or substantial basis . . ."

These cases hold that a state is not acting arbitrarily, in the regulation of the practice of medicine, in requiring that applicants for a license shall attend "a college of good standing" in order to be eligible for an examination leading to a license to practice. This requirement is not a grant of unlimited discretion to a board of examiners. In effect it is a legislative standard to guide the board charged with administering the act. Further, a board of examiners does not act arbitrarily if it construes "college of good standing" as limited to certain approved or accredited schools.

Under *Douglas v. Noble and Graves v. Minnesota* federal courts are admonished to turn to state decisions on these questions and to give great weight to them.

III.

Allopathic State Board of Medical Examiners v. Fowler, 1898, 50 La. Ann. 1358, 24 So. 809 dealt with a statute creating a board of medical examiners composed of physicians recommended for appointment from lists furnished by the Louisiana Medical Society and the Han-

neman [sic] State Medical Society. These organizations represented what were then the two recognized schools of medical science: the allopathic and the homeopathic[2] schools. The statute required an applicant for a license to present to the board a diploma from a medical college in good standing. The defendant had practiced medicine for several years. He had a diploma. But his diploma was from a "reputable institution of the eclectic school of medicine". He claimed that the statute discriminated against practitioners of the eclectic school. The court upheld his conviction on the narrow ground that he had practiced medicine without a license, but the Court upheld the constitutionality in broad terms. The reference to discrimination against the eclectic school is particularly relevant to this case:

> ". . . The legislature has not dealt with the eclectic school of medicine, and discriminated against it: it has simply selected as examiners, as it had the constitutional right to do, boards of examiners composed of physicians recommended for appointment by two certain named medical societies, and appointed by the governor on such recommendation. It has required that a person, before practicing medicine in the state, should present to the boards mentioned a diploma from a medical college in good standing, but it has not attempted to declare and fix what constituted a medical college, nor what particular colleges nor classes of colleges were to be considered as 'medical colleges in good standing' . . . . . We know of no constitutional right given to particular persons, who, entertaining peculiar theories of medicine, group themselves together, and call themselves a special school

[2] Webster's New International Dictionary, Second Edition, (1958) defines "homeopathy" as follows: "The art of curing, founded on resemblances; the theory and its practice that disease is cured by remedies which produce on a healthy person effects similar to the symptoms of the complaint of the patient, the remedies being usually administered in minute doses. This system was founded by Dr. Samuel Hahnemann and is opposed to *allopathy* or *heteropathy*".

of medicine under a selected name, to be recognized as and dealt with as such. An indefinite number of schools of medicine might claim recognition, with no fixed ascertained standard to pass upon their pretensions. . . ."

In *Louisiana State Board of Medical Examiners v. Cronk*, 1924, 157 La. 321, 102 So. 415, the court held that a chiropractor who had treated persons for liver, kidney, stomach complaints and other body ailments was practicing medicine. The court denied "chiropractic" as stated in the margin of this opinion.[3]

The leading case in Louisiana is *Louisiana State Board of Medical Examiners v. Fife*, 1926, 162 La. 681, 111 So. 58;[4] 1927, 274 U.S. 720, 47 S. Ct. 590, 71 L. Ed. 1324. In the Fife case the Board sued to enjoin certain chiropractors from practicing medicine without a license. The defendants contended that the Medical Practice Act was unconstitutional because: (1) chiropractors were required to take materia medica and surgery, and since

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[3] "'Chiropractic' is defined in the catalogue of the Palmer School of Chiropractic as 'the philosophy, science, and art of things natural, and a system of adjusting the subluxated vertabrae of the spinal column, by hand, for the restoration of health.' The dean of the faculty of the Palmer School of Chiropractic testified on the trial of this case as follows:

> 'The theory of chiropractic is that the subluxation produces pressure upon nerves which produce abnormal conditions on the tissues of the body; and by the adjustment of this subluxation the pressure is relieved, normal impulses are allowed to flow through these nerves, and the natural forces of the body, do the rest.'

'A subluxation,' as defined by the defendant in his testimony, is 'a slight displacement of a vertebra.' Defendant also testifies that he uses no drugs in his practice, which consists solely in adjusting the subluxated vertebrae of the spine with both hands, and that the application of the hands is not in the nature of either rubbing or pressing, but is a thrusting movement. . . ." Louisiana State Board of Medical Examiners v. Cronk, 1924, 157 La. 321, 102 So. 415, 416, Appellants quote this definition in their complaint.

[4] A Writ of Error was taken in the Fife case to the United States Supreme Court. The Court affirmed the decision of the Supreme Court of Louisiana in a Per Curiam decision as follows: "May 2, 1927. Per Curiam: Affirmed on the authority of Dent v. West Virginia, 129 U. S. 114, 32 L.Ed. 623, 9 Sup. Ct. Rep. 231; Douglas v. Noble, 261 U.S. 165, 67 L.Ed. 590, 43 Sup. Ct. Rep. 303; and Graves v. Minnesota, 272 U.S. 425, ante, 331, 47 Sup. Ct. Rep. 122."

these subjects had no relation to chiropractic the Act suppresses chiropractors and violates due process; (2) chiropractors are not exempt from the Act as are dentists, osteopaths, and pharmacists, and this denied chiropractors the equal protection of laws guaranteed by the 14th amendment. The Supreme Court of Louisiana held the Medical Practice Act constitutional. In construing the statute the Louisiana Court makes the important point: ". . . While materia medica and surgery are not used in the chiropractic system, still they, as well as the other subjects required by the act, as amended, bear a relation to the practice of medicine as a general science and that, in view of the fact that the Legislature is not bound to recognize every school of medicine, and deal with it as such, is sufficient to prevent the act from being unconstitutional." The Fife case held that the Legislature could, in its discretion, exempt certain groups and provide for them under separate statutes, and that those whom the Legislature did not choose to exempt had to comply with the provisions of the Act if they were practicing medicine. ". . . defendants cannot complain, on the ground of being unjustly discriminated against, because the Legislature has not deemed proper to recognize their school of medicine, and make special provision for those desiring to practice that system, by prescribing a course of study in accord with the theories which it holds for restoring health. . . . If defendants wish to treat the sick in accordance with the theories held by them, they must comply first with the Act of 1914, as amended. . . ."

In *Louisiana State Board of Medical Examiners v. Beatty*, 1951, 220 La. 1, 55 So. 2d 761, a direct attack was made on the "school in good standing" requirement. In that case, chiropractors claimed that the Act was unconstitutional because it vested arbitrary power in the Board in determining what is a "school in good stand-

ing", and thereby denied chiropractors of equal protection of law. On the basis of the Graves case, the Supreme Court of Louisiana rejected this argument and held:

> "The provision that the applicant present a diploma from a college in good standing does not clothe the Board with an arbitrary power but only with the right to exercise discretion."

As to the objection that the Board consistently recognized only schools accepted by the American Medical Association, the court said:

> "... it would make no difference insofar as the constitutionality of the Act is concerned, whether the Board has taken such a stand or not. If the Board has made an arbitrary ruling as to the colleges which it recognizes as being in good standing, the remedy of the injured party is to apply for a mandamus."

IV.

We take up now the language of the Louisiana statute. Appellants assert that their "chief" complaint is that the statutes discriminates against them, "although there exists no distinction, bearing reasonable relation to the object of the statute, between plaintiffs and others, so as to justify the discrimination". They assert also that "the basic issue" is that the Board discriminates against them. There is very little difference between the legal positions of Dr. Fowler, of the eclectic school, and Dr. England, of the chiropractic school.

The Louisiana statute may creak a little with age. But it has managed to work. And it has worked in substantially the same form for more than forty years. The "practice of medicine" is defined broadly enough to apply to witch doctors, voodoo queens, or the pharmacist who

suggest aspirin for a headache.[5] So it should be, in the interest of protecting the public health.

There is no discrimination against chiropractors as such. The Act does not prohibit the practice of chiropractic or of any other system. The statute simply prohibits the practice of medicine without a license. It applies to all. Anyone who can meet the qualifications may take an examination, and upon passing, will be issued a license. Thereafter, if he chooses, he may specialize in the "science of chiropractic". In at least one instance (according to the exhibits) a license was issued to a practicing chiropractor who met the requirements of the Act.

The statute establishes standards. They seem reasonable to me. Section 1271(4) requires an applicant to furnish a diploma from a "college in good standing". Section 1271(5) lists the subjects on which the applicant must be examined: "Anatomy, Physiology, Chemistry, Physical Diagnosis, Pathology and Bacteriology, Hygiene, Surgery, Theory, and Practice of Medicine, Materia Medica, Obstetrics, and Gynecology." This list is surely descriptive of the subjects that the legislature regarded as the minimum requirements for the curriculum of a medical school, if the school is to meet the legislative standard

[5] The present Medical Practice Act of Louisiana was originally Act 13 of 1914. Section 9 of Act 54 of 1918 amended re-enacted Section 13 of the Act of 1914. That section, now La. R.S. 37:1261, reads: "As used in this part 'The Practice of Medicine, Surgery or Midwifery' makes the holding out of one's self to the public as being engaged in the business of diagnosing, treating, curing, or relieving any bodily or mental disease, condition, infirmity, deformity, defect, ailment, or injury in any human being other than himself whether by the use of any drug, instrument or force, whether physical or psychic, or of what other nature, or any other agency or means; or the examining, either gratuitously or for compensation, of any person or material from any person for such purpose whether such drug, instrument, force or other agency or means is applied or used by the patient or by another person; or the attending of a woman in childbirth without the aid of a licensed physician, surgeon or midwife; or the using of any other title other than optician, to indicate that he is engaged in the business of refracting or fitting glasses to the human eye."

of "a college in good standing". Section 1274 shows that legislature equated "a college in good standing" with one approved by the American Medical Association. Section 1275 provides: "The board may waive examinations in favor of any applicant who presents to the Board a satisfactory certificate of examination from a board of medical examiners of another state if the board finds that the certificate of examination from the board of medical examiners of another state was received on the equivalent of *'Class A college standard American Medical Association'*." This amounts to the legislature defining a college in good standing as a "Class A college standard American Medical Association". If the legislature allows the Board to waive examinations in favor of an applicant who presents a certificate from a Board of Examiners from another state only if he presents a certificate received on the equivalent of "Class A college standard American Medical Association", it is not unreasonable or arbitrary for the Board to apply the same minimum standard to Louisiana applicants.

The chiropractors argue that their diplomas are from colleges of good standing and should carry as much weight as a diploma from Johns Hopkins; for example, they say, that the Palmer School of Chiropractic requires a total of 4,485 class hours against 3,397 class hours at Johns Hopkins Medical School. A detailed comparison throws a good deal of light on the reasonableness of the Board's actions measured against the standards considered proper by the legislature. 1,723 hours of subjects not taught at Johns Hopkins are taught at Palmer School. These include 195 hours of "Chiropractic Philosophy", 65 hours of Public Speaking, 65 hours of "Neurocolometer and Neurocolograph", 65 hours of "Ethics and Jurisprudence", 130 hours of "Principles and Practice, Chiropractic", 1,193 hours of Chiropractic Technic, Practice,

and Hygiene. 1,192 hours of subjects not taught at Palmer School are taught at Johns Hopkins: 656 hours of medicine, 352 hours of surgery, 72 hours of pediatrics, 80 hours of pharmacology, 16 hours of psychology, and 16 hours of therapeutics.

This breakdown comes from an exhibit filed by the chiropractors. It seems to me that it demonstrates conclusively the reasonableness of the Board's interpretation of its duty under the Louisiana statute. The Louisiana legislature has said that a license to practice medicine in the state means that the licensee has sufficient knowledge of the subjects listed in Section 1271(5) to pass an examination on these subjects. It is implicit in the act that the licensee studied these subjects in a college of good standing. The exhibits prove that chiropractors have not the training for surgery and general medical knowledge for which a doctor's license is the accepted symbol to the public. On the plaintiffs' showing in this case, the Board would have been derelict in its statutory duty if it had permitted them to take an examination leading to a license.

Finally, the chiropractors complain that the Board arbitrarily and through pure whim discriminates against them in not requiring dentists, osteopaths, nurses, chiropodists, optometrists, pharmacists, and mid-wives to comply with the Medical Practice Act. These occupations or professions are the subject of special legislative acts. As said in the Fife case, in answer to the same argument: the requirements for admission of osteopaths, midwives, chiropodists, trained nurses and others are different; they do not need materia or surgery. The legislature has taken notice of the limited training of a chiropodist or a midwife and has authorized issuance of a restricted license to practice a specialty. But, as in Fife, the legis-

lature is not "called upon to recognize every school of medicine . . . . [It] has a reasonable discretion as to whether a particular school should be recognized and special provisions made for it".

Appellants contend that they do not need materia medica or surgery in the practice of chiropractic. No doubt. But "Dr." carries no descriptive tag. As long as a license to practice medicine implies a knowledge of materia medica and surgery, the Board of Examiners cannot be considered arbitrary or unreasonable in not accepting a diploma from the Palmer School of Chiropractic on the same basis as a diploma from Johns Hopkins Medical School.

Let us suppose that a number of well train psychology majors, after attending Duke University, organize a graduate school of medicine in ESP, using extrasensory perception exclusively for diagnosis and hypnotism exclusively for treatment. Materia medica and surgery have no bearing on the practice of ESP. Their school has 2,000 hours in subjects not taught at Johns Hopkins; Hopkins has no special courses on ESP. It is clear that under the Louisiana law, they practice medicine. Some of the ESP practitioners have had uncanny success in certain cases, especially in the psychiatric field. In thirty years ESP has advanced a long way from the ouija board. It is argued that the public should have the constitutional right to go to a doctor of their choice for medical treatment. I have no doubt that Louisiana could enact a law licensing ESP practitioners to practice their specialty. But the state is under no constitutional obligation to license every organized group giving treatments for health. I cannot imagine this Court or any other court telling the state of Louisiana that its general medical practice act is unconstitutional, because ESP practitioners are not eligible to be licensed. I cannot imagine this Court or any

other court remanding a case to allow an ESP practitioner to show that the Board of Medical Examiners was arbitrary in declaring him ineligible for a license that would allow him to ignore Dr. Rhine's lectures and instead cut open a man's brain.

I say nothing against chiropractors. The American Medical Association may some day go the way of the Hahnemann Medical Society. For all we know, the Louisiana legislature may some day substitute "Chiropractic Philosophy" and "Neurocolometer and Neurocolograph" for materia medica and surgery in Section 1271. I say only that the Medical Practice Act is not arbitrary and unreasonable on its face and accepting the allegations of the complaint as true, the Board of Medical Examiners has not acted arbitrarily or unreasonably, even though the statute, as administered by the Board, has the effect of barring from state medical examinations applicants with diplomas from schools of chiropractic.

The act set up reasonable standards. And everyone toes the same mark.

V.

The district court properly dismissed the complaint for lack of a substantial federal question warranting exercise of jurisdiction. Ex Parte Poresky, 290 U.S. 30, 54 S. Ct. 3, 78 L. Ed. 152. I would affirm.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By s/ Clara R. James
Deputy

New Orleans, Louisiana
Sep 29 1958
(SEAL)

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16920

JERRY R. ENGLAND, ET AL.,
Appellants,

versus

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(January 23, 1959.)

ON PETITION FOR REHEARING.

Before RIVES, BROWN, and WISDOM, Circuit Judges.

PER CURIAM: Appellees' petition for rehearing evidences such complete misunderstanding of the scope and effect of this Court's opinion and decision, that some further elucidation is indicated, particularly in view of the public importance of this litigation. That can best be done in our opinion, by briefly answering the first four grounds of the petition for rehearing.

"1. *The Court, in its opinion of reversal remanding this case for trial, has failed to take into consideration the fact that neither a State nor a Federal Court can supersede the authority of the*

State Legislature, particularly where the health and welfare of the people of the State are at issue."

It is as elementary as it is fundamental that no court can supersede the authority of the state legislature. Certainly, this Court did not and would not attempt to do so. Our opinion clearly stated that: ". . . the question is whether they (chiropractors) are entitled to an opportunity to prove that the State's denial of their claimed right to practice an allegedly useful profession is so arbitrary and unreasonable as to amount to a denial of due process or of the equal protection of the laws under the Fourteenth Amendment." The extent of our holding was thus expressed: "We hold simply that the plaintiffs are entitled to a day in court, to an opportunity to prove their case."

No court, state or federal, has held that a state legislature has *unlimited* power or authority even with respect to such subjects as the health and welfare of the people of the state. The primary responsibility rests with the state legislature, but the courts have a solemn and inescapable duty, in an appropriate case, of deciding whether state action is so arbitrary and unreasonable as to be unconstitutional. That salutary check on the power and authority of a state legislature is recognized in every one of the cases relied on by the petitioners, as will appear from brief quotations in the margin.[1]

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[1] "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors.

(Continued)

"2. *The majority opinion of the Court in its Per Curiam decision does not consider or give effect to prior decisions of the Supreme Court of the*

[1] (Continued)
and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are attainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation." Dent v. West Virgina, 1889, 129 U.S. 114, 121, 122.

"What authority the statute purports to confer upon the board is a question of construction. If it purported to confer arbitrary discretion to withhold a license, or to impose conditions which have no relation to the applicant's qualifications to practice dentistry, the statute would, of course, violate the due process clause of the Fourteenth Amendment." Douglas v. Noble, 1923, 261 U.S. 165, 168.

". . . And the case is to be considered in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare, and its police statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise the authority vested in it in the public interest." Graves v. Minnesota, 1926, 272 U.S. 425, 428.

". . . And, although a state cannot prohibit the practice of medicine and surgery, and would hardly undertake to do such a thing, still it is well established that, under its police power, it may regulate, within reasonable bounds, for the protection of the public health, the practice of either, by defining the qualifications which one must possess before being admitted to practice the same, and, to make these regulations effective, to require the one intending to engage in the practice, to possess, before engaging therein, a certificate from the proper authority showing that he possesses the required qualifications . . . . The Legislature, however, in defining these requirements, cannot prescribe, as a condition to the right to practice, knowledge of a subject which bears no relation to the practice of medicine . . . .

". . . . It the Legislature were called upon to recognize every school of medicine, to deal with it as such, requiring nothing but what the system practiced by each school demands, there might be some force to defendants' contention, but, as we have held, the Legislature is not called upon to do so, but has a reasonable discretion as to whether a particular school should be recognized and special provision made for it . . . ." Louisiana State Board of Medical Examiners v. Fife, 1926, La., 111 So. 58, 60, 61.

United States. In particular, we refer to the following decisions:

Louisiana State Board of Medical Examiners vs. Fife, 162 La. 681, 111 So. 58, 274 U.S. 720;
Graves vs. Minnesota, 272 U.S. 425;
Douglas vs. Noble, 261 U.S. 165;
Dent vs. West Virginia, 129 U.S. 114."

The last three cases are those cited by the Supreme Court of the United States as authority for its per curiam affirmance in the first case. In footnote 1, *supra*, we have quoted from each of the cases, and each, of course, had our careful consideration. It is important to note that every one of those cases was decided upon the *evidence* and not merely upon the *pleadings* as was this case. Further, it is not clear that in the case closest in point, *Louisiana State Board of Medical Examiners v. Fife*, *supra*, there was actually and fully litigated and tried the issue of whether practitioners of chiropractic were engaged in the practice of a useful profession or calling which they had a lawful right to pursue unimpeded by requirements having no relation to such calling or profession. The decision in that case operates as res judicata only as to those who were parties, and does not deprive the present appellants of their day in court.

"3. *The Court recognized that the State has the right to regulate the practice of medicine, and can bar such cults as witch doctors, voodoo queens, bee-stingers, and others, but apparently did not realize that any order that might be issued by this or the District Court compelling the Louisiana State Board of Medical Examiners to issue a medical license to chiropractors would at the same time have the effect of permitting anybody to practice medicine. It may be facetious, but if such an order were ever issued, even the writer of this Petition would have the right to apply to the*

Louisiana State Board of Medical Examiners, and they would have to issue him a medical license."

The Louisiana State Board of Medical Examiners certainly cannot be required to issue to a chiropractor a license to practice medicine unless he complies with all of the statutory prerequisites, including the passing of an examination before the Board upon the subjects of surgery and materia medica,[2] which the appellants claim bear no reasonable relation to the practice of chiropractic. That, however, is not the question at issue. The Louisiana State Board of Medical Examiners has more extensive powers than those of simply examining and licensing applicants for the practice of medicine. It has broad and preferential powers to conduct legal proceedings for the prevention of the unauthorized practice of medicine,[3] as that practice is broadly defined by the Louisiana Statute.[4] Those powers, the complaint alleges, are being used in such a manner as to deprive the plaintiffs of their claimed right to practice chiropractic in Louisiana.[5] As

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[2] La. R.S. 37:1271 (5).

[3] La. R.S. 37:1286.

[4] La. R.S. 37:1261.

[5] "Plaintiffs aver that the Louisiana State Board of Medical Examiners has heretofore, does and threatens to continue to invoke the provisions of the Statute complained of herein as a means of enjoining plaintiffs from exercising their rights and privileges as citizens of the United States and for purposes of imposing fines and penalties on plaintiffs and all chiropractors in the State of Louisiana and by their efforts have caused to be established in the State of Louisiana by the Courts of Louisiana, a rule of law subjecting plaintiffs and all chiropractors to the provisions of the Statute complained of herein; that the alleged basis used to obtain the injunctions and impose fines and forfeitures on your plaintiffs herein and all chiropractors, is that plaintiffs and all chiropractors in Louisiana do not posses a certificate from the Louisiana State Board of Medical Examiners . . . ."

"Plaintiffs allege that the defendants, Rhett McMahon and Edwin H. Lawson, while acting in their respective official capacities as set forth more fully herein before, and official capacities as set forth more fully herein before, and the members of the defendant Board, and the agents, attorneys, employees and servants of said State Board have drafted resolutions authorizing the prosecution in the State Courts of Louisiana of some or all of the plaintiffs herein, have actually prosecuted in the State Courts of Louisiana some of plaintiffs herein, and have thereby sought to obtain and intend to obtain injunctions, fines and forfeitures

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we understand, the plaintiffs can claim no right to practice medicine as that practice is engaged in by medical doctors and surgeons. The question is whether they can be constitutionally excluded from the practice of chiropractic in Louisiana.

> 4. *The majority opinion of the Court has completely overlooked the fact that the Medical Practice Act of Louisiana does not prohibit the practice of chiropractic but merely defines what constitutes the practice of medicine and directs the State Board to issue licenses to practice medicine only to those qualified as defined in the Statute. If a man is qualified to and takes the required examination under the Medical Practice Act, he can practice chiropractic, or for that matter, any of the other cults that have developed on the fringe of true medicine."*

The answer is that the mere form of the statutes of a state cannot justify or excuse the deprivation of one's rights under the Constitution of the United States. The "practice of medicine" is defined broadly enough[6] to apply to dentists, nurses, and pharmacists. Each of those three professions is protected by a special statute, but if it were not, would only one deny the jurisdiction of a federal district court to protect a dentist, a nurse, or a pharmacist in the practice of his or her useful profession

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[5] (Continued)
against plaintiffs herein and thereby intend to prohibit under penalty of imprisoment the plaintiffs herein from practicing their professional skills, all in purported reliance on said Act complained of herein and only because plaintiffs are chiropractors; that plaintiffs are now and threaten to continue to be greatly harmed, damaged, imprisoned and injured by the illegal, wrongful, knowing and purposeful acts of the defendants, and each of them, and they have no plain, adequate or efficient remedy at law to redress the wrongful, knowing and purposeful acts of the defendants other than this action for Declaratory Judgment and Injunctive relief; that any other remedy to which they could be remitted would be attended by uncertainties, would involve a multiplicity of suits and would cause plaintiffs irreparable harm and injury and occasion undue hardship, vexation and delay."

[6] See Footnote 4, *supra*.

or calling? We reiterate our holding that the plaintiffs are entitled to an opportunity to attempt to prove that chiropractic is such a useful profession or calling that they cannot be constitutionally excluded from its practice in Louisiana in the manner and form claimed to be attempted by the State Legislature and by the State Board of Medical Examiners. Nothing said in our original opinion should operate to limit the evidence to the period since the decision in *Louisiana State Board of Medical Examiners v. Fife, supra.*

The foregoing was all that we had originally written in denying the petition for rehearing. Our dissenting brother, whose opinion we value highly, remained unconvinced, and further expressed his views so cogently and vigorously that we have been led to make a careful reexamination of our own views. They remain the same, but, to make certain that we do not continue to be misunderstood, we shall attempt still further to elucidate those views at considerable length.

It was in 1888, before the Supreme Court had the opportunity to consider the full impact of the Fourteenth Amendment upon the rights of the States (couched in terms, "Police Power") to regulate the practice of medicine and the related healing arts,[7] that the case of *Dent v. West Virginia*, 1888, 129 U.S. 114, was decided. The Court upheld a state regulation which made it mandatory for persons who practiced medicine, surgery, or obstetrics either to have graduated from a reputable medical college or to have practiced medicine for ten continuous years

[7] Before 1888 the Supreme Court had interpreted the effect of the Fourteenth Amendment upon various state laws which regulated alleged property and liberty guarantees on the basis of public health and welfare. These cases developed the well-known early policy of judicial restraint in economic due process. *E.g.*, Munn v. Illinois, 1876, 94 S.Ct. 113; Barbier v. Connally, 1885, 113 U.S. 27; Yick Wo v. Hopkins, 1885, 118 U.S. 356; Mugler v. Kansas, 1887, 123 U.S. 623; Powell v. Pennsylvania, 1887, 127 U.S. 679.

preceding the enactment. The Court stated that every citizen of the United States has a right to follow any lawful calling, business, or profession, "subject only to such restrictions as are imposed upon all persons of like age, sex, and condition . . . and [this right] cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken." (129 U.S. at pp. 121, 122.) On the other side of the baalnce, however, is the right of the state to regulate to protect the health and general welfare of its people. Concerning this police power, the Court stated the following language which has served as the basis for practically every decision concerning state regulation over the medical field:

> ". . . . But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity

can be raised because of their stringency or difficulty. *It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.*" (Emphasis supplied.) 129 U.S. at pp. 121, 122.

Therefore, the *Dent* case established that only when the regulations "have no relation to such calling or profession" will they be struck down as arbitrary or unreasonable or capricious.

After the *Dent* case, several cases reiterated its holding that the courts would practice "judicial restraint" in reviewing the constitutionality of state laws concerning the regulation of public health and welfare.[8] With

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[8] The Court upheld such various health and general welfare enactments as a statute expressly prohibiting barber shops to be considered a "work of necessity or charity" which would prevent them from doing business on Sunday (Petit v. Minnesota, 1899, 177 U.S. 164); a license tax of $100.00 for the sale of cigarettes (Gundling v. Chicago, 1900, 177 U.S. 183), and a statute preventing any felon from practicing medicine whether the conviction came before or after the enactment (Hawker v. New York, 1897, 170 U.S. 189). However, the Court did hold an act regulating the slaughtering of animals and the inspection of meats unconstitutional as a burden on interstate commerce (Minnesota v. Barber, 1889, 136 U.S. 313).

In 1905 in the case of Jacobson v. Massachusetts, 197 U.S. 11, Justice Harlan, speaking for the Court in upholding the constitutionality of a compulsory vaccination law against attacks by healthy individuals, stated:

"Although this Court has refrained from any attempt to define the limits of that power (police power), yet it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description'; indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. (197 U.S. at p. 25)

"....

"If there is any such power in the judiciary to review legislative action in respect to a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, *has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law*, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. Mugler v. Kansas, 123 U.S. 623, 661; Minnesota v. Barber, 136 U.S. 313, 320;

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the *Dent* case thus strengthened, the case of *Watson v. Maryland*, 1910, 218 U.S. 173, came before the Court. A *practicing physician* attempted unsuccessfully to have the Maryland Medical Practice Act declared unconstitutional as arbitrary and containing unreasonable classifications and requirements which were similar to the present Louisiana Act.[9] He was admonished with the following strong language from the Court:

> "It is too well settled to require discussion at this day that the police power of the States extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine. Dealing, as its followers do, with the lives and health of the people, and requiring for its successful practice general education and technical skill, as well as good character, it is obviously one of those vocations where the power of the State may be exerted to see that only properly qualified persons shall undertake its responsible and difficult duties." (218 U.S. at p. 176.)[10]

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[8] (Continued)

Atkin v. Kansas, 191 U.S. 207, 223." (Emphasis supplied.) (197 U.S. at p. 31.)

However, Justice Harlan warned:

". . . .—that the police power of a State, whether exercised by the legislature, or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression. Extreme cases can be readily suggested." (197 U.S. at p. 38.)

[9] In *Watson v. Maryland*, 1910, 218 U.S. 173, the Act required all physicians to stand an examination in various subjects unless they had been practicing for a required number of years or had treated so many people in the past year. The Act also provided for the requirements of good moral character and a diploma from certain medical colleges.

[10] However, the above quote was qualified with this language:

"It was therein held [Williams v. Arkansas, 217 U.S. 79] that regulations of a particular trade or business essential to the public health and safety are within the legislative capacity of the State in the exercise of its police power, and that unless such regulations are so *unreasonable and extravagant* as to interfere with property and personal rights of citizens, unnecessarily and arbitrarily, they are within the

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Only two years later in *Collins v. Texas*, 1912, 223 U.S. 289, the Court, through Mr. Justice Holmes, strengthened the Court's laissez-faire attitude of lack of interference with a State's regulation over the field of medicine. Collins was an osteopath who professed "to help certain ailments by scientific manipulation affecting the nerve centres." After a two-year course of study, he held a diploma from the American School of Osteopathy, Kirksville, Missouri. The Texas Medical Practice Act was practically identical to the one in the present case. Its definition of "practicing medicine within the meaning of this Act" was all inclusive. After providing for obtaining verification licenses for all existing medical practitioners, it provided that all new applicants must be graduates of "bona fide reputable medical schools," reputability to be met when the school's "entrance requirements and courses of instruction are as high as those adopted by the better class of medical schools of the United States . . . ." The Act also required the applicant, after presenting such a diploma, to pass an examination on the subject of anatomy, physiology, chemistry, histology, pathology, bacteriology, physical diagnosis, surgery, obstetrics, gynecology, hygiene, and medical jurisprudence. The Act then specifically excluded from its operation dentists, nurses, masseurs, and surgeons of the Armed Forces.

Observing that Collins had not presented his osteopathy diploma to the Board of Medical Examiners and had not attempted to obtain a verification license, the Court held that his proof failed to show that the statute

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[fn] (Continued)

power of the State; and that the classification of the subjects of such legislation, so long as such classification has a *reasonable basis* and is not merely arbitrary selection without real difference between the subjects included and those omitted from the law, does not deny to the citizen the equal protection of the laws." (Emphasis supplied.) (218 U.S. at p. 178).

inflicted any constitutional wrong, especially since there was no showing that the required examination covered such subjects as therapeutics or materia medica which had no relation to osteopathy.

The Court further held that the plenary definition of practicing medicine in Section 13 of the Act was not arbitrary or irrational since its purpose was merely to define who should come within the terms of the Act, and "we should presume, until the Texas courts say otherwise, that the reference in §4 to the diploma of a reputable and legal college of medicine and the confining in §7 of examinations to graduates of reputable medical schools, use the words medicine and medical with the same broad sense as §13, and that the diploma of the plaintiff in error would not be rejected merely because it came from a school of osteopathy." 223 U.S. at p. 296. After thus presuming that graduates of reputable schools of osteopathy would be eligible to take the examinations in the named subjects, the Court concludes that these examinations were not unreasonable or capricious or unrelated requirements to the practice of osteopathy and that the expressed exclusion of nurses, masseurs or dentists was not discriminatory.[11]

[11] "In short, the statute says that if you want to do what it calls practising medicine you must have gone to a reputable school in that kind of practice. Whatever may be the osteopathic dislike of medicines, neither the school nor the plaintiff in error suffers a constitutional wrong if his place of tuition is called a medical school by the act for the purpose of showing that it satisfies the stautory requirements. He cannot say that it would not have been regarded as doing so, because he has not tried. *Dent v. West Virginia*, 129 U.S. 114, 124.

"An osteopath professes, the plaintiff in error professes, as we understand it, to help certain ailments by scientific manipulation affecting the nerve centres. It is intelligible therefore that the State should require of him a scientific training. *Dent v. West Virginia*, 129 U.S. 114; *Watson v. Maryland*, 218 U.S. 173. He like others must begin by a diagnosis. It is no answer to say that in many instances the diagnosis is easy—that a man knows it when he has a cold or a toothache. For a general practice science is needed. An osteopath undertakes to be something more than a nurse or a masseur, and the difference rests precisely in a claim to greater science, which the State requires him

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Therefore, this case, by dictum, raises an analogous issue to one raised in the case at bar, where the chiropractors contend that the defendant Board, by limiting applicants to graduates of American Medical Association approved schools, has aribtrarily prevented chiropractors from becoming eligible to take the required examination. In other words, that the requirement of a "diploma from a college in good standing *of any sect* teaching medicine or the healing art" under Section 1271 must be construed (under a reasonable interpretation) in the "same broad sense" as Section 1261, "and that the diploma of the plaintiff in error would not be rejected merely because it came from a school of" chiropractic. Plaintiffs follow through by saying that the Palmer School of Chiropractic *is* a "college in good standing *of any sect* teaching medicine or the healing art."

In two cases heavily relied upon by the appellees, *Douglas v. Noble*, 1923, 261 U.S. 165, and *Graves v. Minnesota*, 1926, 272 U.S. 425, the Court expressed in strong language that the state legislature may, within the limitations of reasonableness and non-arbitrariness, exercise its police statutes so as to prescribe regulations, requirements and qualifications, for *dentists practicing dentistry* within the State.[12] However strongly the appellees rely

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[11] (Continued)

to prove. The same considerations that justify including him justify excluding the lower grades from the law." Collins v. Texas, 1912, 223 U.S. 296, 297.

[12] In *Douglas v. Noble*, an act of the State of Washington which provided license requirements for dentists was under attack as being an arbitrary exercise of legislative power. After providing for good moral character and a diploma from a reputable dental college, the act allowed the dental board to determine what "knowledge and skill is necessary and whether the applicant possesses this" by an examination. The applicant met the first two requirements but flunked the dental board's examination. The Court summarily held that there was no arbitrary discretion to grant or withhold or revoke licenses.

In *Graves v. Minnesota*, the Minnesota Act required that every applicant for a dentist's license should produce before the Board of Dental Examiners "his diploma from some dental college of good

(Continued)

upon these two cases, we cannot see how they can be anything but authority for the general proposition that such a case.

> ". . . . is to be considered in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare, and its police statutes may only be declared unconstitutional where they are *arbitrary* or *unreasonable* attempts to exercise the authority vested in it in the public interest." (Italics supplied.) *Graves v. Minnesota*, 272 U.S. at p. 428.

In line with *Douglas v. Noble* and *Graves v. Minnesota*, *supra*, the Court has held that a state, by insisting upon the personal obligations of the individual, may deny the right to practice dentistry to corporations, *Miller v. State Board of Dental Examiners*, 1932, 287 U.S. 563, may prohibit dentists from advertising or having any kind of publicity, *Semler v. Dental Examiners*, 1935, 294 U.S. 608, and may prohibit the selling of eyeglasses at any retail store without the personal attendance of a physician or optometrist, *Roschen v. Ward*, 1929, 279 U.S. 337.

The case which the appellee-Board says is dispositive of the case at bar is *Louisiana Board of Medical Examiners v. Fife*, 1927, 162 La. 681, 111 So. 58, aff'd per curiam on the authority of *Dent v. West Virginia*, *supra*, *Douglas v. Noble*, *supra*, and *Graves v. Minnesota*, *supra*. The *Fife* case was based in large part upon two earlier decisions of the Louisiana state courts, *Allopathic State*

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[12] (Continued)

standing" of which the Board shall be the judge. Dentist Graves did not have a diploma from such college, was refused a license, and was thus convicted under the Act. In holding that the diploma requirement from such college is not unreasonable, arbitrary, or discriminatory under the Fourteenth Amendment, the Court stated that "it is well settled that a state may, consistently with the Fourteenth Amendment, prescribe that only persons possessing the reasonable, necessary qualifications of learning and skill shall practice medicine or dentistry."

Board of Medical Examiners v. Fowler, 1898, 50 La. Ann. 1358, 24 So. 809, and *Louisiana State Board of Medical Examiners v. Cronk*, 1924, 157 La. 321, 102 So. 415, discussed in the margin.[13]

The *Fife* case was an appeal from an enjoining of chiropractors from practicing medicine without a license. After reiterating that "practicing chiropractic" was under the definition of practicing medicine (as held in the *Cronk* case, *supra*), the Court answered the chiropractors' contentions that the requirements of the Act, having no reasonable relation to "chiropractic," virtually suppress" chiropractic in violation of constitutional rights[14] by stating, and we paraphrase from the opinion: Although a state cannot prohibit the practice of medicine, it may, under its police power, regulate it within reasonable bounds, by defining the qualifications necessary to admission to practice and requiring a certificate from a proper authority showing that one possesses the above qualifications. As to the examination in such courses as materia medica and surgery (alleged to be immaterial to

[13] In the *Fowler* case, the members of the board of medical examiners were either of the allopathic or the homeopathic schools of medical science. The defendant had a diploma from an eclectic school of medicine, and, upon conviction of practicing medicine without a license, he defended on the grounds that the statute discriminated against the eclectic school. The court held that a person's constitutional rights did not bind the state to recognize and deal with each "special school of medicine under a selected name."

In the *Cronk* case, the court upheld a conviction of practicing medicine without a license, deciding that practicing chiropractic was within the definition of "Practice of Medicine, Surgery or Mid-wifery."

[14] The court stated the issue:

". . . . Their contention is that to require them to stand an examination in surgery and materia medica, and perhaps in other things, is to require them to be qualified in subjects for which they and those who practice chiropractic have no need, and which bear no relation to that system, and, since the effect of these requirements is to virtually suppress the practice of chiropractic in this state, they plead that the statute deprives them of liberty and property without due process of law, in violation of the constitutions of this state and of the United States."

Louisiana Board of Medical Examiners v Fife, 1927, 162 La. 681, 111 So. 58, 60.

chiropractic), the legislature cannot require knowledge of a subject which bears no relation to the practice of medicine. But this does not mean that the state must make requirements for each particular school of medicine or each theory of the healing arts (*Fowler* case, *supra*). Likewise, the exclusion of others (as dentists and osteopaths) from the Act does not unconstitutionally discriminate against chiropractors because there is no constitutional right given to a particular group of people which requires a state to recognize them as a special school of medicine (*Fowler* case, *supra*). Therefore,

> ". . . . If the Legislature were called upon to recognize every school of medicine, and to deal with it as such, requiring nothing but what the system practiced by each school demands, there might be some force to defendants' contention, but, as we have held, the Legislature is not called upon to do so, *but has a reasonable discretion* as to whether a particular school should be recognized and special provision made for it." (Italics supplied.) (111 So. at p. 61.)

There have been three recent cases concerning state regulation in the field of the healing art which help fill the picture of the court's role as a reviewing authority in this area. These three cases are *Williamson v. Lee Optical Company*, 1955, 348 U.S. 483, reversing 120 F. Supp. 128; *Dantzler v. Callison*, S. Car. 1956, 94 S.E. 2d 177, dismissed per curiam for want of a substantial federal question, 1956, 352 U.S. 939; and *Hitchcock v. Collenberg*, 1956, 140 F. Supp. 894, aff'd per curiam, 1957, 353 U.S. 919.

In *Williamson v. Lee Optical Company* the end result of an Oklahoma Act was to outlaw opticians. A three-judge district court held several features of the Act un-

constitutional.[15] *After thoroughly examining the evidence*, the Supreme Court, through Mr. Justice Douglas, reversed the district court on four particular facets, speculating on the evidence in the record that:

> "... the legislature might have concluded ... (p. 487).
>
> "... the legislature may think .... (p. 489).
>
> "... the legislature might conclude ... (p. 490).
>
> "... it may be deemed important .... (p. 491)."

Therefore, the method of review or test used by the Court was to determine *from the evidence* the legislative purpose or objective and then determine if the "regulation has no *rational relation* to that objective and therefore is beyond constitutional bounds." (Emphasis supplied.) 348 U.S. at p. 491. This was evident early in its opinion where the court concluded:

> "... But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business

[15] The district court held *inter alia* that the prevention of opticians from replacing lenses was unconstitutional, because the regulation was not "reasonably and rationally related to the health and welfare of the people ... that it was purely mechanical and any expert optician could do it, and the regulation constituted an arbitrary interference with the optician's right to do business; that it was unconstitutional to subject opticians to the Act and to exempt makers of ready-to-wear glasses; and that the section which made it unlawful to solicit the sale of frames or other optical appliances and the section which prohibited the renting of space to people doing eye examinations were also unconstitutional, these having no reasonable relation to public health.

> and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. See *Nebbia v. New York*, 291 U.S. 502; *West Coast Hotel Co. v. Parish*, 300 U.S. 379; *Olsen v. Nebraska*, 313 U.S. 236; *Lincoln Union v. Northwestern Co.*, 335 U.S. 525; *Daniel v. Family Ins. Co.*, 336 U.S. 220; *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421. We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, 94 U.S. 113, 134, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'" (348 U.S. at pp. 487-488.)

Dantzler v. Callison was an original action brought in the Supreme Court of South Carolina attacking a statute which expressly made it unlawful for anyone other than medical doctors to practice naturopathy. The plaintiffs, who had practiced naturopathy before the act, raised many of the same constitutional issues as were raised in the case at bar. Prefacing that naturopathy is a comparatively new profession and has been recognized "as accepted processes of preventive and curative medicine," the South Carolina court felt constrained to hold the act constitutional as a valid exercise of police power.[16]

Related to *Dantzler v. Callison* is the case of *Hitchcock v. Collenberg* where naturopaths sought to have de-

[16] The Court concluded that the state had properly set as standards for naturopaths the qualifications for medical doctors since naturopaths were known to practice "the use and practice of physiotherapy, minor surgery, obstetrics, gynecology, autotherapy and biologicals" and to specialize in "purifying, cleansing and normalizing human tissues for preservation or restoration of health, according to the fundamental principles of anatomy and physiology." The court restated the familiar principles that it is up to the legislature to set standards for the practice, since the right to practice medicine, surgery, or naturopathy, is a right granted upon condition; that while a state may not prohibit the practice of medicine or surgery, it may, under its police power, regulate within reasonable bounds for the protection of the public health; that while the legislature cannot prescribe, as a condition to the right to practice, knowledge which does not relate to the profession, the legislature does not have to provide for every school of medicine or every school of the healing arts which may exist.

cleared unconstitutional the Maryland Medical Practice Act. The *Hitchcock* case closely parallels the *Fife* case—the definition of practice of medicine included naturopathy by implication; the applicant was required to take an examination in non-naturopathic subjects; and the Act contained special provisions for the licensing of many other groups other than naturopaths. The district court's opinion followed the *Fife* case, stating: "This is good law and good sense in Maryland as well as Louisiana." (140 F. Supp. at p. 901.)

It must be noted that the three-judge court in the *Hitchcock* case granted the defendant's motion to dismiss the amended complaint and the Supreme Court affirmed this judgment per curiam, citing *Taylor v. Oklahoma*, 352 U.S. 805; *Dantzler v. Callison*, 352 U.S. 939; and *Dent v. West Virginia*, 129 U.S. 114. The case of *Taylor v. Oklahoma*, 291 P. 2d 1133, appeal dismissed for want of a substantial federal question, 352 U.S. 805, raised substantially the same question as *Hitchcock v. Collenberg* and the Supreme Court of California said that the state's practice act was not unconstitutional for failing to provide for naturopaths.

Every case we have thus far discussed except the *Hitchcock* case has been decided upon a full record, fully developing the facts and defining the issues. We think it sound judicial policy to decide grave constitutional questions only after the parties have had a full trial and have developed a full evidentiary record. Only this "can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision" and may even avoid the need for a constitutional decision. *United States v. Auto Workers*, 1957, 352 U.S. 567, 591, 592. Only this can present the constitutional issue "'in clean-cut and concrete form, uncloud-

ed.'" *Naim v. Naim*, 1955, 350 U.S. 891. In a special concurring opinion in *Borden's Co. v. Baldwin*, 1934, 293 U.S. 194, 213, Mr. Justice Stone and Mr. Justice Cardozo stated:

> "We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer."

See also, *United States v. Petrillo*, 1946, 332 U.S. 1, 6; *Federation of Labor v. McAdory*, 1945, 325 U.S. 450, 460, 463; *Picking v. Pennsylvania R. Co.*, 1945, 151 F. 2d 240, 244; *United States v. Foster*, 1948, 80 F. Supp. 479, 484; *Colonial Hardwood Floor Co. v. International Union*, 1948, 76 F. Supp. 493, 496; *Merced Dredging Co. v. Merced County*, 1946, 67 F. Supp. 598, 615.

In view of the cases discussed, *supra*, it is of interest to note that the Supreme Court has never changed its policy of reviewing with reluctance and self-restraint state regulations in the medical field, even though other state economic regulations have met a fluctuating substantive due process stand.[17]

We have dwelled at length on the prior case law simply to determine if the law has evolved into allowing

[17] In the early history of the Fourteenth Amendment, state economic regulations were reviewed with a great presumption as to their validity. See cases in note 7, *supra*. Then, during the first few decades of this century, the Court struck down many of these public health and welfare laws on substantive due process grounds. *See Lochner v. New York*, 1905, 198 U.S. 45; *Coppage v. Kansas*, 1916, 236 U.S. 1; *Weaver v. Palmer Bros. Co.*, 1926, 270 U.S. 402. Since then, the tide has turned back to a very expressive "judicial restraint." See *supra* in the body of this opinion the quote from *Williamson v. Lee Optical Company*, 348 U.S. at p. 488. This change in its policy of substantive due process review over state economic regulation is discussed thoroughly in *Lincoln Union v. Northwestern Company*, 1949, 335 U.S. 525, 535, 536, 537, and *Daniel v. Family Ins. Co.*, 1948, 336 U.S. 221, 224, 225.

the State under its police authority substantially to outlaw an apparently useful and beneficent profession with no showing or proof otherwise, for only if that were possible could we affirm the district court. We determine that the State has no such authority.

Particularly in the field of medicine and the healing art is the State given very broad powers. But the authority to regulate is limited by some constitutional standard and that standard is defined and applied by the courts. The Supreme Court of the United States has said that a state may not regulate in this field, when the regulations

> ". . . have no relation to such calling or profession . . . ." *Dent v. West Virginia*, 129 U.S. 114, 122.
>
> ". . . [have] no real or substantive relation to those objects . . . ." *Jacobson v. Mass.*, 197 U.S. 11, 31.
>
> ". . . are so unreasonable and extravagant as to interfere with property and personal rights of citizens, unnecessarily and arbitrarily . . . ." *Watson v. Maryland*, 218 U.S. 173, 178.
>
> ". . . are arbitrary or unreasonable attempts to exercise the authority vested in it [legislature] in the public interest." *Graves v. Minnesota*, 272 U.S. 425, 428.
>
> ". . . [have] no rational relation to that objective and therefore is beyond constitutional bounds." *Williamson v. Lee Optical Company*, 348 U.S. 483, 491.

Here, the allegations of the complaining chiropractors certainly place the *application* of the Louisiana Medical Practice Act *to chiropractors* squarely within the above

prohibitions.[18]

We give full recognition to the State's power to regulate, reasonably and rationally, all facets of the medical field, even to excluding certain professions or specialists or schools by subjecting them to the rigid requirements of medical doctors or by expressly outlawing them. But the State cannot outlaw an allegedly useful and lawful profession without a "reasonable" or "rational" basis for so doing. The plaintiffs say no such basis exists and the defendants say it does. We must, upon motion to dismiss (treated as summary judgment), take the plaintiffs' allegations as true. Thus taken, they make out a prima facie case under existing law. That is the limit to our holding.

Indeed, the burden upon the plaintiff is great, if not insurmountable. They must show that the Act as administered "has no rational relation" to the regulation of chiropractic and "therefore is beyond constitutional bounds." *Williamson v. Lee Optical Company, supra*, 348 U.S. 483, 491. For such a determination, it is immaterial whether chiropractic is considered as a school or cult or theory or specialty or profession. That is for the legislature to determine if the plaintiffs prevail in this suit. The petition for rehearing is

DENIED.

WISDOM, Circuit Judge, Dissenting.

I regret that I cannot go along with the majority of the Court. There is not so much disagreement between

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[18] We lay little import to the allegation that the Act is prima facie unconstitutional as investing the Board with the power to discriminate against chiropractors. Almost the exact wording in the present Act was found in the statute in *Collins v. Texas, supra*, 1912, 223 U.S. 289, allowing the Board to determine who were eligible for examination.

us on principle as there is lack of any meeting of the minds as to the scope and effect of the Court's decision. I see the holding in this case as jostling the balance between the states and the federal government. My learned brothers do not see it that way. I respect their judgment and I know that they are concerned as I to avoid any improper extension of the authority of the federal judiciary at the expense of the reserved powers of the states. I feel bound therefore to give some of the reasons for my dissent that were not stated fully in my first opinion, originally prepared as the opinion of the Court.

My brothers expressly repudiate any attempt to supersede the authority of the state legislature; "this Court did not and would not attempt to do so." They see the question as a narrow one: the question is whether "the plaintiffs are entitled to a day in Court, to an opportunity to prove their case.

"The right to a day in Court" is a powerful cantrip as well as a fundamental maxim of justice. The spell of these words is hard to resist. Here, it is luring us from the broad highway of long accepted principles of law into tangled trails.

I cannot see what purpose will be served by giving the plaintiffs a day in court to prove that chiropractic may be a useful profession and that chiropractors are not surgeons. No one denies that chiropractic may be a useful profession. Or that some intelligent persons go to chiropractors* for treatment. Or that chiropractors whose medical activities are restricted by law to adjusting sub-

* I use the term "chiropractor" to mean a person trained in a school of chiropractic, but not in a medical school, or who is unable or unwilling to meet the eligibility standards for applicants for a license under the Medical Practice Act. Unless the context expresses a different meaning, the term does not include eligible applicants for a doctor's license or licensed doctors who engage in the practice of chiropractic.

luxated vertebra by thrusting movements of the hands have no need for a knowledge of surgery and materia medica. To give the plaintiffs a day in Court for the purpose of proving these undisputed facts is to decide the case now for the plaintiffs. It amounts to holding the Louisiana Medical Practice Act arbitrary, unreasonable, and unconstitutional on its face.

In *Louisiana State Board of Examiners v. Fife*, *Douglas v. Noble*, *Dent v. West Virginia*, and *Graves v. Noble* evidence had to be taken because a critical issue in each case was whether the accused had in fact practiced medicine or dentistry without a license. Remanding this case will only confound the trial judge and confuse the constitutional issue.

Medical practice acts enjoy no immunity from constitutional attack. But a federal court stretches its jurisdiction beyond reasonable limits when it undertakes to say to a state: You must allow chiropractors to take examinations for a medical license, even if they cannot meet the qualifications you consider necessary for all those who practice medicine; in the alternative, chiropractors may practice medicine without a license, free from the warranties a license carries and subject to none of the special restraints legislatures consider necessary for the protection of the public from chiropractors. I do not know where we derive the power to issue such a command. There is no discrimination in statutory standards applied to all candidates for a medical license. We cannot say that the state is acting arbitrarily or unreasonably if it finds a rational connection between medical training at a reputable medical school and the practice of medicine.

Agitation for legislation authorizing licensing of

chiropractors is nothing new in Louisiana. The subject comes up at every session of the legislature. It came up in the 1958 session. It is bound to come up again in 1960. It is the sort of problem the state legislature is equipped to handle. For fifty years Louisiana has weighed the merits and demerits of specifically licensing chiropractors. Because of the extremely limited medical training chiropractors receive and because of the attraction the profession of chiropractic has had in the past for quacks, it has seemed good sense to the Louisiana legislature, as to all state legislatures, not to license chiropractors under a general medical practice act unless they meet the same eligibility standards required of all candidates for a medical license; and, to license chiropractors (if at all) only by specific legislation restricting their professional activities and putting the public on notice that a doctor in chiropractic is not a surgeon and not a doctor competent to prescribe drugs. This is within the judgment of the legislature. It is not a judicial question. Louisiana takes its stand with Massachusetts that the dangers to the public of licensing chiropractors, as such, still outweigh the advantages.

The plaintiffs are in the wrong forum asking for the wrong relief from the wrong lawmaker. The plaintiffs' real complaint is that the legislature has not passed a law making a special exception for their benefit. Exceptions are a matter of legislative grace. It is not for us to supply the omission. The question before us is the limited one of the constitutionality of a particular statute: the reasonableness of educational requirements and other safeguards in the light of the purpose of the statute.

I do not see a federal court as having any right to challenge the purpose of a state law, if the purpose is

lawful. The purpose of the Louisiana Medical Practice Act is to regulate the practice of medicine by providing for the licensing of doctors competent to perform surgical operations, deliver babies, and administer drugs. It is not for us to say that the purpose should be broader; that the statute should include provisions for licensing persons to practice medicine who cannot perform surgical operations, deliver babies, and administer drugs. That was not the law the Louisiana legislature passed.

The majority opinion states that the question "is whether they [chiropractors] can be constitutionally excluded from the practice of chiropractic in Louisiana." There is nothing in the statute or in its administration that denies a man the right to practice chiropractic, as such. The plaintiffs are not excluded because they want to be chiropractors or because there is any exclusion of chiropractic as a profession. They are excluded because they can not or will not meet minimum standards fixed by the legislature as necessary and proper in order to be eligible to receive a license to practice medicine. It is common knowledge in Louisiana that there are a number of practitioners specializing in chiropractic. But these practitioners toed the mark set for all applicants who want a license under the Medical Practice Act. I fail to see anything discriminatory in a licensing requirement applicable to all-comers.

I do not understand the majority's statement that the plaintiffs "can claim no right to practice medicine as that practice is engaged in by medical doctors and surgeons." The complaint alleges that the Board of Examiners refuses to accept the plaintiffs as candidates eligible to stand an examination for a medical license, although the plaintiffs have diplomas from chiropractic schools. The plaintiffs allege that this is an unreasonable and

arbitrary application of the statute and ask that the Board be enjoined "from so enforcing the statute complained of herein." They ask this Court to order the Board to give them examinations for a license under the Act. In other words, plaintiffs may say that they intend to practice only chiropractic—but in this suit they are demanding the same license issued to surgeons or heart specialists.

A license issued under the Medical Practice Act is a badge with a definite meaning to the public. The meaning is that the holder of such a license is a qualified surgeon and a qualified medical practitioner. It does not seem arbitrary to me that a state legislature should be able to say to its citizens that we shall try to protect you from all incompetent persons (including chiropractors) performing brain surgery, prescribing cancer cures, and breaking your necks, by requiring all candidates for a medical license to have received adequate instruction in surgery and materia medica from practicing surgeons and practicing medical doctors associated with a medical college of recognized merit. It seems reasonable to me that the legislature should say, even ability to pass a written examination on surgery is not enough; a man must witness and study surgical operations actually being performed, before he can put up a sign with "Dr." in front of his name. You don't learn surgery by reading about it in a fat book.

The rationale of the Louisiana act is, that there is a reasonable connection between practicing medicine and requiring candidates for a medical license to have adequate training in medicine, obstetrics, and surgery. If an exception is to be made for certain practitioners, such as for nurses or chiropodists or dentists, special legislation is necessary to protect the public. The experience

of other states supports the reasonableness of this view.

No state allows chiropractors to be issued a license under the general provisions of a medical practice act. In every state where chiropractors are permitted to practice there is either a special act applicable to chiropractors or special provisions dealing with chiropractors.[1] In all of these states the law, in terms, prohibits chiropractors administering drugs and medicines, performing major or minor surgery, and practicing obstetrics or osteopathy.[2] And in such states a chiropractor may hold himself out only as a doctor of chiropractic. But the purpose of the licensing provisions of the Louisiana

[1] Alabama: Title 46, Sec. 258-297, Code of 1940; Alaska: Comp. Laws. 1949, Sec. 35-3-21—35-3-30; Arizona: Rev. Stat. 1956, Sec. 32-901—32-927; Arkansas: Stat. 1947, Sec. 72-401—72-414; California, Sec. 1000, 1001, Business and Professions Code; Colorado: Rev. Stat. 1953, Sec. 23-1-1—23-1-17; Connecticut: Gen. Stat. 1949, Supp. 1955, Sec. 4378—4387; Supp. 2195d—2197d; Delaware: Title 24, Sec. 701 to 716, Code Ann. 1953; Florida: Stat. Ann. 1951, Ch. 460; Georgia: Sec. 84-501—84-521, Code Ann.; Idaho: Sec. 54-701—54-714, Code 1947; Illinois: Rev. Stat., ch. 91, Sec. 1—16x; Indiana: Burns' Stat., Sec. 63-1326—63-1337; Iowa: Ch. 151, Code Ann.; Kansas; Gen. Stat. 1949, Sec. 65-1301—65-1311; Kentucky: Rev: Stat. 1953, Ch. 312; Maine: Rev. Stat., 1954, Ch. 72; Maryland: Sec. 499—514, Ann. Code 1957, art. 43; Michigan: Comp. Laws 1948, Sec. 338.151—338.159; Minnesota: Stat. Ann., Sec. 148.01—148.10; Missouri: Vernon Ann. Stat., Ch. 331; Montana: Sec. 66-501—66-517, Rev. Codes 1947; Nebraska: Rev. Stat. 1943. Sec. 71-177—71-182: Nevada: Comp. Laws 1929, Sec. 1080—1092; New Hampshire: Rev. Stat. 1955, Sec. 316:1—316:20, New Jersey: Stat. Ann., Sec. 45:9-41.1—45:9-41.16; New Mexico: Stat. 1953, Sec. 67-3-1—67-3-8; North Carolina: Gen. Stat., Sec. 90-139—90-157; North Dakota; Ch. 43-06, Rev. Code 1943; Ohio: Ch. 4731, Page's Rev. Code; Oklahoma: Stat. Ann., Title 59, Sec. 161—168; Oregon: Rev. Stat., Ch. 684; Pennsylvania: Purdon's Stat., Title 63, Sec. 601—624; Rhode Island: Sec. 5-30-1—5-30-17, Gen. Laws 1956; South Carolina: Sec. 56-351—56-361, Code 1952; South Dakota: Ch. 27.05, Code 1939, Supp. 1952; Tennessee: Sec. 63-401—63-420, Code Ann.; Texas: 4512b, Vernon's Civ. Stat.; Utah: Sec. 58-12-1—58-12-22, Code Ann. 1953; Vermont: Stat. Rev. 1947, Sec. 6757—6770; Virginia: Sec. 54-273—54-325, Code 1950; Washington: Remington's Rev. Stat., Sec. 10098—10111; West Virginia: Sec. 2998—3012, Code 1955; Wisconsin: Stat. Ann., Sec. 147.23—147.26; Wyoming: Comp. Stat. 1945, Sec. 37-701—37-717.

[2] For example: "A license to practice chiropractic granted by the board of examiners shall not confer upon the licensee the right to practice surgery or obstetrics, prescribe, compound or administer drugs or to administer anaesthetics"; Colorado rev. stat. 1953 ch. 23-1-2. A certificate issued to a chiropractor "shall not entitle him (or her) to practice major surgery or to prescribe or administer drugs"; Alabama Code 1940 sec. 259. "Chiopractors shall not prescribe or administer medicine to patients, peform surgery, nor practice obstetrics or osteopathy"; Georgia Code Ann. Title 84 Section 509.

Medical Practice Act is to authorize a person to do the very things a chiropractor is prohibited from doing in the states granting licenses to chiropractors.

Four states — Louisiana, Mississippi, Massachusetts and New York—have no specific provisions licensing chiropractors or other persons to practice medicine according to a special system using no drugs or surgery. Four states—Alabama, Illinois, Ohio and Utah—do not have separate acts, but make special provision for chiropractors in the general medical practice act. Only the Alabama and Ohio acts specifically mention chiropractors; Illinois and Utah, in a general act have separate provisions for "treating human ailments without drugs or medicines and without operative surgery." The license issued in Alabama, Illinois, Ohio and Utah is based on a separate special examination and limits the practice to the system of healing taught at the applicant's school. 41 states have specific acts licensing chiropractors. These acts virtually track the language of the medical practice act of the same state, but set up a special board of examiners and prescribe special educational requirements for chiropractors. In all the 44 states allowing the practice of chiropractic, the license issued to a chiropractor is one that recognizes his limitations, restricts his professional activities, and prevents his holding himself out as a licensee under a general medical practice act.

Thus, the considered decision of the legislatures of all the states is that chiropractors, if licensed at all, should be hedged with restrictions under special statutory provisions. This is a fair measure of the reasonableness of the Louisiana Medical Practice Act and of the reasonableness of the interpretation placed on the act by the Board of Medical Examiners. Are we to say that all the states are wrong; that two federal judges have the

power to authorize chiropractors to practice medicine without a license and without any of the safeguards forty-nine state legislatures consider necessary for the protection of the public?

There is no decision in the books holding unconstitutional a medical practice act on the ground that the necessary effect of the statute is to exclude chiropractors or other persons whose limited training fails to come up to the standards required of all applicants. There is no decision in the books holding that a licensing board under a general statute acts unreasonably and unconstitutionally if it finds chiropractors ineligible for a general medical license. The Supreme Court of Louisiana has upheld the constitutionality of the act on the very contentions made in this case. The Supreme Court of the United States regarded the question as so well settled that it held recently in a similar case (involving naturopathic practitioners) that there is no federal question. *Hitchcock v. Collenberg*, 353 U.S. 919 (1957).

Few courts have ever admitted that they superseded the authority of a state legislature. That would be judicial lawmaking. The plain fact is, however, that courts do supersede the legislature's authority whenever they substitute their notion of reasonableness for the notion of reasonableness expressed in statutory standards. I do not quarrel with this fact of life. Judicial review of legislation is a vital part of the American governmental system, and federal courts are under a duty to supersede a state's authority whenever, in the opinion of the court, the state's denial of a claimed right is so arbitrary and unreasonable as to amount to a denial of due process or of equal protection of the laws.

The court's duty is obvious when state action violates an express constitutional prohibition or when the Su-

preme Court has chartered a course lower courts must follow. Here we are on our own. In this case we are fixing a limit to state legislative action by drawing a line, known but to God and us, between what *we* think is reasonable and what *we* think is unreasonable.

In these circumstances I cast my vote for judicial restraint relying on some well-worn generalizations. First, in the American system of government the judiciary owes a punctilious respect for the actions of the legislative branch. This may mean no more than a presumption of constitutionality. Here, it seems to me, it means that when it comes to deciding what is a reasonable regulation of the practice of medicine, the legislature is not only the appropriate body to make the decision, it is better qualified and has had more experience than the court in handling the problem. Legislators may even be as reasonable as we. Second, the effective working of the federal system depends upon federal courts showing a punctilious respect for state action. That attitude is particularly appropriate when the action is in a sphere traditionally occupied by the states, is of long standing, and is approved by the highest courts of the state. Here, the state has acted to protect the health of its citizens from the effects of ignorance and deception on the part of persons professing to practice medicine. The statutory safeguards have been in effect for many years and have been approved by the Supreme Court of Louisiana and the Supreme Court of the United States. Short of a manifest, overpowering constitutional violation we should be slow to interfere with such state action. States should regulate their doctors.

This case turns on reasonableness. The reasonableness of local medical regulations is a matter of preeminent concern to the state—to its legislature that is re-

sponsible for making the laws and to its courts who are primarily concerned with the validity of the laws. The reasonableness of such a law as the Louisiana Medical Practice can be (and has been) determined more appropriately and just as surely and fairly by state courts as by federal courts.

I do not cotton to a federal court allowing chiropractors to come in by the back door when the state legislature and state courts have rejected their credentials at the front door. We chip away at the federal system whenever we assume jurisdiction we do not have. We chip away at the federal system whenever the issue is primarily one for the state to decide and the existence of a federal question is doubtful but could be resolved properly against assumption of federal jurisdiction.

In *Konigsberg v. State Bar of California*, 1957, 353 U.S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722, Mr. Justice Frankfurter, dissenting, makes the point: "[Jurisdiction] is a matter of deep importance to the workings of our federalism." He quotes Benjamin R. Curtis: "Let it be remembered, also,—for just now we may be in some danger of forgetting it,—that questions of jurisdiction were questions of power between the United States and the several states." 2 Memoir of Curtis, 340-341. And from Mr. Justice Stone: "Due regard for the rightful independence of state government, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta*, 292 U.S. 263, 270, 78 L. Ed. 1248, 54 S. Ct. 700.

This Court does not have jurisdiction unless there is a federal question. Clearly, unequivocally—or so it seems to me—the United States Supreme Court has held that there is no federal question in a case such as that now

before us. *Hitchcock v. Collenberg*, 1957, 353 U.S. 919, 77 S. Ct. 679, 1 L. Ed. 2d 718; *Louisiana State Board of Medical Examiners v. Fife*, 1927, 274 U.S. 720, 47 S. Ct. 590, 71 L. Ed. 1324. The district court, therefore, correctly declined jurisdiction.

I hope that I misunderstand the effect of the majority opinion. After the plaintiffs prove that chiropractic is a useful profession and that they have no need for surgery, materia medica, and training at a medical school, the trial judge will have no alternative except to render judgment for the plaintiffs. On appeal, this Court will have been committed to the proposition that there is no rational connection between the practice of medicine and medical training, because some persons in the practice of medicine can make a useful living with their hands and without employing a knowledge of all the medical subjects the legislature regards as necessary for doctors holding a medical license. This Court is now saying to the Louisiana legislature: Chiropractors must be allowed to take examinations for a general medical license, even though they are ineligible under the licensing statute; in the alternative, the statute is unconstitutional, because the eligibility standards are not low enough to permit chiropractors to qualify. Therefore, we, the federal Court of Appeals, authorize chiropractors to practice medicine subject to none of the restrictions Louisiana and 48 others states consider essential for the protection of the public against chiropractors.

I respectfully dissent to the judgment remanding the case for trial and to the order for a rehearing.

APPENDIX D

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer

of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX E

Policy of State concerning medicine, medical professions, and food and drinks.

Section 12. The Legislature shall provide for the interest of State Medicine in all its departments; for the protection of the people from unqualified practitioners of medicine, dentistry, veterinary medicine and pharmacy; for protecting confidential communications made to practitioners of medicine and dentistry and druggists by their patients and clients while under professional treatment and for the purpose of such treatment; for the protection of the people against the sale, barter, gift and use of injurious or adulterated drugs, foods and drinks and against any and all misbranding and adulteration of the general necessaries of life of whatever kind or character.

APPENDIX F

LOUISIANA REVISED STATUTES

Applicable to the practice of medicine and surgery in Louisiana.

Louisiana Revised Statutes
37:1261 through 37:1290

May 31, 1955

MEMBERS
of the
LOUISIANA STATE BOARD OF
MEDICAL EXAMINERS
Rhett McMahon, M. D., President
Baton Rouge
Robert T. Lucas, M. D., Vice-President
Shreveport
J. Morgan Lyons, M. D.
New Orleans
Edmund L. Leckert, M. D.
New Orleans
Edwin H. Lawson, M. D., Secretary-Treasurer
930 Hibernia Bank Bldg.
New Orleans 12

LOUISIANA REVISED STATUTES

37:1261 through 37:1290

37:1261. Definitions

As used in this Part, "the practice of medicine, surgery, or midwifery" means the holding out of one's self to the public as being engaged in the business of diagnosing, treating, curing, or relieving any bodily or mental disease, condition, informity, deformity, defect, ailment, or injury in any human being other than himself whether by the use of any drug, instrument or force, whether

physical or psychic, or of what other nature, or any other agency or means; or the examining, either gratuitously or for compensation, of any person or material from any person for such purpose whether such drug, instrument, force, or other agency or means is applied or used by the patient or by another person; or the attending of a woman in childbirth without the aid of a licensed physician, surgeon or midwife; or the using of any other title other than optician, to indicate that he is engaged in the business of refracting or fitting glasses to the human eye.

37:1262. Louisiana State Board of Medical Examiners; appointment

The Louisiana State Board of Medical Examiners is created.

The board shall consist of five members appointed by the governor from a list of names recommended by the Louisiana State Medical Society.

All members of the board shall be graduate physicians or surgeons and practitioners.

37:1263. Vacancies; removal

The governor shall fill all vacancies on the board from recommendations made according to R.S. 37:1262

The governor may remove any member of the board for inefficiency or neglect of duty.

37:1264. Term of members

Each member of the board shall serve for the term of six years.

37:1265. Meetings of board

The regular meetings of the board shall be held at least twice in each year in the city of New Orleans. A special meeting of the board may be called by the president at any place when a majority of the board, or its

president, deems it expedient. The call shall be issued by the Secretary-treasurer.

37:1266. Quorum

Three members of the board constitutes a quorum for all purposes including the holding of examinations and the granting of certificates.

37:1267. Compensation and expenses of members of board

The members of the Louisiana State Board of Medical Examiners shall receive ten dollars per day during their session and also their hotel and traveling expenses if traveled by the most direct route to and from their respective places of residence. These expenses shall be paid out of the treasury of this board upon the certificates of the president and secretary-treasurer.

37:1268. Receipts and disbursements

All monies collected by the Louisiana State Board of Medical Examiners shall be deposited in the treasury of the board.

All expenses and compensation of members shall be paid out of the funds of this board only and shall never be a charge on the state.

37:1269. Duties and powers of the board

A. The board shall:

(1) Examine all applicants for the practice of medicine other than the homeopathic system of medicine;

(2) Have its seal;

(3) Report to the prosecuting officer of the state all persons violating the provisions of this Part.

B. The board may:

(1) Select officers and adopt rules and by-laws necessary for the efficient operation of the board;

(2) Authorize any member of the board to [redacted] any affidavit necessary to the issuance of any injunction or other legal process authorized under this Part; and

(3) Employ counsel to carry out the provisions of this Part, if the fees of the counsel and the costs of all proceedings, except criminal prosecutions, are paid by the board out of its own funds.

C. The president and secretary of the board may administer oaths in the taking of testimony upon any matters appertaining to the duties of the board.

37:1270. Certificate to practice mediicne or midwifery required

No person shall practice medicine or midwifery in any of its departments unless he possesses a certificate issued under this Part and duly recorded.

37:1271. Qualifications of applicants

Any person who wishes to practice medicine shall:

(1) Be Twenty-one years of age;

(2) Be a citizen of the United States;

(3) Be of good moral character;

(4) Present to the board a diploma from a college in good standing of any sect teaching medicine or the healing arts; and

(5) Pass an examination before the board upon the following: Anatomy, Physiology, Chemistry, Physical Diagnosis, Pathology and Bacteriology.

Hygiene, Surgery, Theory and Practice of Medicine, Materia Medica, Obstetrics, and Gynecology.

37:1272. Examinations to be in writing and kept as records

All examinations given by the board and the answers of applicants shall be in writing, and shall be kept as records for a period of two years.

37:1273. Issuance of certificate

If the requirements of R.S. 37:1271 are met to the satisfaction of the board, the board shall issue to the applicant a certificate to practice medicine.

37:1274. Temporary permits to naturalized citizens

The board may issue a temporary permit to practice medicine to one who has taken out his first naturalization papers and who complies with the other requirements of this Part.

37:1275. Other states, certificate of examination

The board may waive examination in favor of any applicant who presents to the board a satisfactory certificate of examination from a board of medical examiners of another state if the board finds that the certificate of examination from the board of medical examiners of another state was received on the equivalent of "Class A College standard American Medical Association."

37:1276. Midwifery; examination; certificate

All persons who wish to practice midwifery shall appear before the Louisiana State Board of Medical Examiners and stand an examination in midwifery as the board requires. If the examination is satisfactory, the board shall issue a certificate to practice midwifery.

The Louisiana State Board of Medical Examiners may allow one member of the board to conduct the exam-

ination for midwifery, and if the applicant passes this examination, he shall be entitled to be authorized by the board to practice midwifery.

(For midwifery in Orleans Parish see Revised Statutes 37:1331 through 37:1339)

37:1277. Temporary permits

One member of the board may grant a permit to any applicant after a satisfactory examination and shall report this immediately to the secretary-treasurer. This temporary permit shall not continue in force longer than until the next regular meeting of the board and shall not be granted in violation of any rule of the board.

In addition, the board may grant a temporary permit to any doctor of medicine who meets the requirements of the board, if such applicant is serving as a first year intern, or is in a one, two, three or four year residency or graduate medical training program, provided such residency, internship or training program is approved by the board, in any public or private hospital in this state. Such temporary permit may be renewed annually, not to exceed four years. As amended Acts 1956, No. 380, #1.

37:1278. Certificate, conclusive proof of

The certificate issued by the board shall be conclusive proof of the efficiency of the holder thereof.

37:1279. Recording of certificate; cancellation

Every person issued a certificate under this Part and before he begins practice shall personally have his certificate recorded with the clerk of the court in the parishes in which he desires to practice. The clerk of court shall make this recordation in a book to be kept for that purpose only and shall also certify to the recordation

by an endorsement of the certificate. He shall be entitled to a fee of one dollar for recording. Until the recordation is made the holder of the certificate shall not exercise any of the rights or privileges conferred by it.

Upon notification from the secretary-treasurer of the board of the suspension or revocation of a certificate, the clerk of court where the certificate was recorded shall cancel such recordation.

37:1280. Renewals

Every certificate issued under this Part shall be renewed annually on or before January first upon payment of the renewal fee prescribed in R.S. 37:1281.

Any certificate not renewed may be suspended by unanimous vote of the board. The suspension is subject to review by the courts.

37:1281. Fees

The board may charge the following fees:

(1)	Examination fee for practice of medicine	$25.00
(2)	Examination fee for midwives	10.00
(3)	Fee for issuing certificates	2.00
(4)	Temporary permit fee	10.00
(5)	Interns, resident and graduate medical training temporary permit fee	5.00
(6)	Renewal fee of any certificate except the renewal fee of an interne or a person enjoying a residency in an approved hospital	10.00
(7)	Renewal fee of any certificate for an interne or a person enjoying a residency in any approved hospital	2.00

The temporary permit fee shall be credited to the applicant when he applies to the board for permanent certificate. As amended Acts 1956, No. 379, #1.

37:1282. Annual publication of list of certiifcate holders; evidence

The Louisiana State Board of Medical Examiners shall publish annually a list of the names and residences of the holders of certificates issued under this Part. This published list shall be received in evidence by the courts as proof that the individuals named are duly registered. The board may strike from this list the name of any person whose certificate has been suspended or revoked.

The secretary-treasurer of the Louisiana State Board of Medical Examiners shall furnish the State Board of Health and the Federal Internal Revenue Department an annual published list referred to in this Section and also a list of the successful applicants to whom certificates are issued.

37:1283. Reports by board

The board shall report annually to the governor upon the condition of the practice of medicine in the state, make recommendations for the improvement of the practice, and send a record of the proceedings of the board during the year, together with the names of all physicians or surgeons to whom the board issued certificates during the year under R.S. 37:1273.

37:1284. Provisions relative to unlicensed physicians

Unlicensed physicians shall not be exempt from jury or military duty, or be permitted to collect any fees or charges for services rendered, or be allowed to testify as a medical or surgical expert in any court, or execute any certificates as a physician or surgeon, or hold any medical office, or be recognized by the state or parish or municipal corporation as a physician or surgeon, or be entitled to enjoy any of the privileges, rights, or exemptions granted to physicians or surgeons by the laws of this state.

37:1285. Causes for refusal to issue, suspension or revocation of certificates

The board may refuse to issue, suspend, or institute proceedings in any court of competent jurisdiction to revoke any certificate issued under this Part for any of the following causes:

(1) Conviction of a crime;

(2) Fraud, deceit, or perjury in obtaining a diploma or certificate;

(3) Habitual drunkenness;

(4) Habitual use of morphine, opium, cocaine, or other drugs having a similar effect;

(5) Prescribing of cocaine, morphine, or other habit forming drugs in other than a legal or legitimate manner;

(6) Procuring, aiding or abetting in procuring an abortion unless done for the relief of a woman whose life appears in peril after due consultation with another licensed physician; or

(7) Advertising means or medicine whereby monthly periods can be regulated or re-established;

(8) Advertising special ability to treat or cure chronic or manifestly incurable disease;

(9) Efforts to deceive or defraud the public;

(10) Impersonation of another licensed practitioner;

(11) Incompetence;

(12) Having professional connection with or lending one's name to an illegal practitioner; or having any professional connection with any person convicted under the provision of this section;

(13) Employing solicitors or subsidizing agencies, or paying or presenting any person money or anything of value for the purpose of securing patients;

(14) Persistent violation of federal and state law relative to control of social diseases;

(15) Interdiction by due process of law;

(16) Violation of any provisions of this Part.

Any certificate revoked may be reinstated by the board.

37:1286. Injunction; penalty; attorney's fees; costs

The board through its proper officer may cause to issue in any competent court a writ of injunction enjoining any person from practicing medicine in any of its departments, until such person obtains a certificate under the provisions of this Part. This injunction shall not be subject to being released upon bond.

In the suit for an injunction, the board, through its president, may demand of the defendant a penalty of not more than one hundred dollars, and attorney's fees not to exceed fifty dollars, besides the cost of court. This judgment for penalty, attorney's fees, and costs may be rendered in the same judgment in which the injunction is made absolute.

The trial of the proceeding by injunction shall be summary and by the judge without a jury.

37:1287. Anaesthetics, administering by midwives, penalty

No person holding a certificate to practice midwifery shall administer any form of anaesthetic to any person under their care unless done by the direction and under the supervision of a licensed physician.

Whoever violates this Section shall be fined not more than one thousand dollars, or imprisoned for not more than six months or both.

37:1288. Itinerant vendors of drugs; penalty

No itinerant vendor shall profess to cure or treat disease or deformity by any drug, nostrum, manipula-

tion, or other expedient which he may offer for sale or demonstration.

Whoever violates this Section shall be fined not less than twenty dollars nor more than one hundred dollars for each offense, or imprisoned for not less than ten days nor more than thirty days or both.

37:1289. Penalties

Whoever violates any of the provisions of this Part shall, for each offense be fined not less than fifty dollars nor more than one hundred dollars, or imprisoned for not less than ten days nor more than ninety days, or both.

37:1290. Exemptions

None of the provisions of this Part shall apply to:

(1) Any commissioned physician or surgeon of the United States Army, Navy, or Public Health Service, practicing in the discharge of his official duties; or

(2) Physicians or surgeons of other states or territories in actual consultation with a licensed physician of this state; or

(3) The giving of family remedies in cases of emergency; or

(4) Licensed dentists, pharmacists, osteopaths, practicing according to law; or

(5) Anyone attending in an emergency a woman in childbirth; or

(6) The practice of Christian Science or religious rules or ceremonies as a form of religious worship, devotion or healing, if the persons administering, making use of, assisting, or prescribing this practice rely on faith and prayer alone, do not prescribe or administer drugs or medicine, or perform surgical or physical operations, or assume the title of, or hold themselves out to be physicians or surgeons.

APPENDIX G

§ 1331. Federal question; amount in controversy

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. June 25, 1948, c. 646, 62 Stat. 930.

APPENDIX H

§ 1343. Civil rights

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. June 25, 1948, c. 646, 62 Stat. 932.

APPENDIX I

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. § 1977.

* * * * *

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.

APPENDIX J

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of any appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, § 12(p), 72 Stat. 349.

* * * * *

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

APPENDIX K

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§ 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

* * * * *

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, oper-

ation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to

vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 849

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS, ET AL.,
Petitioners,

v.

JERRY R. ENGLAND, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION.

The Fifth Circuit Court of Appeals ordered this case remanded for full development of the facts (Petitioners' Appendix, p. 23); there is no adjudication below of any substantive legal import, and the petition should be denied as premature.

The original Complaint (which Petitioners have not reproduced here) alleged violations of federal rights guaranteed by the Fourteenth Amendment (Petitioners' Appendix, p. 74), and certain federal statutes (Petitioners' Appendix, pp. 89, 90).

The District Court dismissed the Complaint on the ground that it presented no unsettled federal question, holding that "in the absence of diversity of citizenship, this court is without jurisdiction" (Petitioners' Appendix, p. 19):

Noting plaintiffs' averments of federal rights infringed, the Court of Appeals reversed and remanded, saying:

> Without hearing the evidence, we cannot say that these claims are untrue * * *. (Petitioners' Appendix, p. 23).

The Court of Appeals denied a rehearing; pointed out that not only was the constitutionality of the Louisiana Medical Practice Act drawn in issue, but, before reaching that question, the Complaint also challenged the legality of the Medical Board's action in administering that statute. That Court reviewed applicable decisions of this Court, and specifically found that the averments of the Complaint "certainly place the *application* of the Medical Practice Act *to chiropractors* squarely within the above prohibitions" (Petitioners' Appendix, pp. 61-62). Obviously this case may be finally resolved without in any way involving constitutionality of the State statute, as claimed by the Petition (pp. 2-3).

In its present posture the cause stands for remand so that all of the facts may be fully developed. No substantive question has been decided. No reason has been suggested to warrant a departure from this Court's settled policy of reviewing only decisions of legal import in accord with Rule 19. See Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, by Wolfson and Kurland (1951), sec. 130.

CONCLUSION

Since the Court of Appeals ordered the cause remanded simply for development of the facts, there is no decision on the law to review. The petition for certiorari is premature, and should not be granted.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that copies of this Brief in Opposition have been served upon counsel for petitioners, Robert E. LeCorgne, Jr., and St. Clair. Adams, Jr., of Adams and Reese, 847 National Bank of Commerce Building, New Orleans 12, Louisiana, by placing in the United States Mail, postage prepaid, on May , 1959.

RUSSELL MORTON BROWN